ADMINISTRATIVE LAW

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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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AGENDA OF ANNUAL MEETING
Boston, Mass.

Kenmore Hotel
Sunday, August 23
10:30 A. M.

Meeting of Council (committee chairmen invited).

2:00 P. M.

Council Meeting continued.

Kenmore Hotel
Monday, August 24
2:00 P. M.

General Session

Demonstration in cooperation with the Federal Communications Commission and the Federal Communications Bar Association—

"Can Pre-trial Techniques Save Time and Money and Improve Justice in Administrative Hearings?"

Council member E. Blythe Stason, Dean of the Law School, University of Michigan, in charge of demonstration;

Sample administrative pre-hearing conference—involving three competitive television applications for a single television assignment, facing formal hearing. (From the Federal Communications Bar Association, Messrs. Fischer and Koplovitz; from the staff of the Federal Communications Commission itself, Messrs. Ford and Raw-

Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

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son and Federal Trial Examiner Gaguine.)
Cast:

Federal Trial Examiner—Henry G. Fischer

Counsel for each of three television applicants—Benito Gaguine, Robert J. Rawson, Frederick W. Ford

Commission counsel—William C. Koplovitz

Panel discussion: Your questions and prejudices; the cast, and a panel consisting of Rosel H. Hyde, Chairman, Federal Communications Commission; E. Barrett Prettyman, Circuit Judge, United States Court of Appeals for the District of Columbia Circuit; Federal Trial Examiner J. D. Bond.

The University Club
Tuesday, August 25
8:00 A. M.

Joint Breakfast Meeting, Sections of Administrative Law and Judicial Administration.

Ira W. Jayne, Chairman, Section of Judicial Administration; John W. Cragun, Chairman, Section of Administrative Law, jointly presiding.

Address by Honorable E. Barrett Prettyman, Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, and Chairman of the President's Conference on Administrative Procedure—

"Can the Length, Complexity, Delay and Expense of Proceedings before Federal Administrative Agencies be Reduced?"

Kenmore Hotel
Tuesday, August 25
10:00 A. M.

General Session

John W. Cragun, Chairman, presiding:

Report of Chairman

Discussion of Pending Legislation

S. 1708: Report of Committee on Federal Trial Examiners, Donald C. Beelar, *Chairman.*

Debate: Should Federal Trial Examiners be Subject to Presidential Appointment?

Affirmative: Robert N. Denham, Esq.

Negative: Clarence A. Miller, Esq.

Discussion: S. 1752; Should Official Advice be Reliable?

Frank C. Newman, *Vice-chairman,* Committee on Improvement of Administrative Procedures; *Chairman,* Sub-committee on Good-Faith Reliance Act.

Committee Reports.

2:00 P. M.

General Session

Discussion: Suggestions for the Work of the President's Conference on Administrative Procedure.

Ralph F. Fuchs, *Chairman,* Committee on Improvement of Administrative Procedures.

Committee Reports.

Report of Nominating Committee and Election of Council Members.

Adjournment.

COMMITTEE REPORTS

[In order to reduce printing costs the names of committee members other than the chairmen are omitted.]

REPORT ON STATUS OF LEGISLATION BY THE NATIONAL COMMITTEE

The National Committee submits herewith a report of the status of legislation introduced in the 83d Congress which has been deemed of interest to the Section of Administrative Law, showing the number of each bill, the date of introduction, the sponsor of the bill, the title of the bill, the Congressional Committee to which the bill was referred and the action taken thereon, and the Section Committee or office to which the bill has been assigned for consideration and appropriate action thereby.

Senate Bills

S. 14

Introduced Jan. 7, 1953, by Sen. McCarran, To improve the administration of justice by the creation of an Administrative Court of the United States; referred to the Senate Committee on the Judiciary and now pending before Subcommittee No. 4 thereof; assigned to Vice-Chairman Robert M. Benjamin and to the Committee on Improvement of Administrative Procedures.

S. 17

Introduced Jan. 7, 1953, by Sen. McCarran, To provide general rules of practice and procedure before Federal agencies; referred to the Senate Committee on the Judiciary and now pending before Subcommittee No. 4 thereof—public hearing held Mar. 12, 1953, at which Section representatives appeared and testified; assigned to Vice-Chairman Robert M. Benjamin, and Committee on Improvement of Administrative Procedures.

S. 18

Introduced Jan. 7, 1953, by Sen. McCarran, To amend the Administrative Procedure Act, and eliminate certain exemptions therefrom; referred to the Senate Committee on the Judiciary, reported to the Senate favorably, without amendment Mar. 20, 1953 (S. Rep. No. 111), passed the Senate as reported May 6, 1953, and referred to the House Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Procedure Act.

S. 19

Introduced Jan. 7, 1953, by Sen. McCarran, To suspend the running of the statutes of limitations applicable to offenses involving performance of official duties by Government officers and employees during periods of Government service; referred to the Senate Committee on the Judiciary, where it is now pending; assigned to Committee on Code of Conduct for Government Employees.

S. 24

Introduced Jan. 7, 1953, by Sen. McCarran, To permit judicial review of decisions of Government contracting officers involving questions of fact arising under Government contracts in

cases other than those in which fraud is alleged, referred to Senate Committee on the Judiciary, reported to the Senate favorably with amendments (S. Rep. No. 32), passed the Senate as reported, on May 6, now pending before House Judiciary Committee; assigned to Committee on Finality Clauses in Government Contracts.

S. 26

Introduced Jan. 7, 1953, by Sen. McCarran, To amend ch. 19, title 5, of the United States Code, entitled "Administrative Procedure," so as to prohibit the employment by any person of any member, official, attorney, or employee of a Government agency except under certain conditions; referred to the Senate Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Procedure Act, Committee on Code of Conduct for Government Employees, and Committee on Administrative Practitioners.

S. 43

Introduced Jan. 7, 1953, by Sen. McCarran, To amend sec. 215 of title 18, United States Code, to prohibit officers or employees of the United States from accepting payments for appointment or retention of a person in office or employment under the United States; referred to the Senate Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Practitioners.

S. 106

Introduced Jan. 7, 1953, by Sen. McCarran, To amend the Administrative Procedure Act, and eliminate certain exemptions therefrom; referred to the Senate Committee on Government Operations; passed Senate May 6, 1953 (S. Rep. No. 216); pased House as amended June 4, 1953; Senate agreed to House amendments June 27, 1953; Approved July 10, 1953 (Pub. Law No. 108). Assigned to Committee on Administrative Procedure Act.

S. 107

Introduced Jan. 7, 1953, by Sen. Anderson, A bill to provide for the development of the oil and gas reserves of the Continental Shelf adjacent to the shores of the United States, to protect certain equities therein, to confirm the titles of the several states to lands underlying inland navigable waters within State boundaries, and for other purposes; referred to Senate Committee on Interior and Insular Affairs, where it is now pending subject to consideration of a similar bill, S. 1901, introduced May 18, 1953, by Sen. Cordon; assigned to Committee on Natural Resources and Interior Affairs.

S. 223

Introduced Jan. 7, 1953, by Sen. Butler of Nebraska, To amend sec. 284 of the United States Code relating to disqualifications of former officers and employees in matters connected with their former duties; referred to Senate Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Practitioners.

S. 637

Introduced Jan. 26, 1953, by Sen. Wil-

liams, To amend sec. 284 of title 18 of the United States Code so as further to prohibit former officers and employees of the United States from acting as counsel, attorney, or agent in matters connected with their former office or employment; referred to Senate Committee on the Judiciary, where it is now pending following hearings held on Mar. 24, 1953; assigned to Committee on Administrative Practitioners.

S. 657

Introduced Jan. 26, 1953, by Sen. Taft, To amend the National Labor Relations Act, as amended, to provide for improved procedures of the NLRB and to expedite its disposition of cases; referred to the Senate Committee on Labor and Public Welfare, where it is now pending; assigned to Committee on Labor.

S. 753

Introduced Feb. 2, 1953, by Sen. Capehart, To provide standby economic controls, and for other purposes; referred to Senate Committee on Banking and Currency, which reported favorably to the Senate a revised bill, S. 1081, which passed the Senate on May 19, now pending before House Banking and Currency Committee; assigned to Committee on Emergency Agencies.

S. 776

Introduced Feb. 4, 1953, by Sen. Green, To repeal Section 10 of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (the so-called Walsh-Healey Act); referred to the Senate Committee on Labor and Public Welfare, where it is now pending before a subcommittee; assigned to Committee on Labor.

S. 905

Introduced Feb. 13, 1953, by Sen. Johnson of Colorado, To authorize the Interstate Commerce Commission to revoke or amend, under certain conditions, water carrier certificates and permits; referred to the Senate Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Transportation.

S. 906

Introduced Feb. 13, 1953, by Sen. Johnson of Colorado, To establish the finality of contracts between the Government and Common Carriers of passengers and freight subject to the Interstate Commerce Act; referred to Senate Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Finality Clauses in Government Contracts.

S. 1118

Introduced Feb. 27, 1953, by Sen. Capehart, To provide for the control and regulation of bank holding companies, and for other purposes; referred to the Senate Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

S. 1185

Introduced Mar. 4, 1953, by Sen. Lan-

ger, To amend further the Federal Register Act, as amended; referred to Senate Committee on the Judiciary where it is now pending; assigned to Committee on Improvement of Administrative Procedures.

S. 1264

Introduced Mar. 11, 1953, by Sen. Ives, To amend the Labor Management Relations Act of 1947, as amended, so as to clarify the authority of the States and Territories with respect to certain cases within the purview of such Act; referred to Senate Committee on Labor and Public Welfare, where hearings were concluded Apr. 30, 1953, and it is now pending further consideration by the full committee; assigned to Committee on Labor.

S. 1287

Introduced Mar. 11, 1953, by Sen. Hunt, To amend the Natural Gas Act; referred to Senate Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Gas and Electric Power.

S. 1491

Introduced Mar. 27, 1953, by Sen Butler of Nebraska, To provide for the revision of the public land laws in order to provide for orderly use, improvement, and development of the Federal lands and to stabilize the livestock industry dependent upon the Federal range, and for other purposes; referred to Senate Committee on Interior and Insular Affairs, where it is now pending; assigned to Committee on Natural Resources and Interior Affairs and to Committee on the Administrative Procedure Act.

S. 1501

Introduced Mar. 30, 1953, by Sen. Tobey, To authorize the Interstate Commerce Commission to revoke, amend, or suspend, under certain conditions, water carrier certificates and permits; referred to Senate Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Transportation, and to Committee on the Administrative Procedure Act.

S. 1514

To establish a Commission on Intergovernmental Relations; passed Senate May 6, 1953 (S. Rep. No. 215); passed House as amended June 4, 1953; House agreed to Senate amendments to House amendments June 27, 1953. Approved July 10, 1953 (Pub. Law No. 109). Assigned to Committee on Administrative Procedure Act.

S. 1680

Introduced April 17, 1953, by Sen. Aiken, To provide for emergency action under Section 22 of the Agricultural Adjustment Act, as amended; referred to Senate Committee on Agriculture and Forestry, where action is pending awaiting a report from the Department of Agriculture; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

S. 1708

Introduced Apr. 21, 1953, by Sen. McCarran, To amend Section 11 of the Administrative Procedure Act, and for other purposes; referred to Senate

Committee on the Judiciary, where it is now pending before Subcommittee No. 4; assigned to Committee on Administrative Procedure Act, to Committee on Improvement of Administrative Procedures, and to Committee on Selection and Qualification of Hearing Examiners.

S. 1752

Introduced Apr. 24, 1953, by Sen. Langer, To establish good faith as a defense in certain cases; referred to Senate Committee on the Judiciary, where it is now pending; assigned to Vice-Chairman Robert M. Benjamin, and to Committee on Improvement of Administrative Procedures. (Letter informally requesting introduction of bill submitted on behalf of American Bar Association.)

S. 2049

Introduced June 4, 1953, by Sen. Smith of North Carolina, To prohibit the payment of compensation to officers or employees of the Government who have refused on grounds of self-incrimination to give testimony before congressional committees; referred to Senate Committee on the Judiciary; assigned to Committee on Code of Conduct for Government Employees.

House Bills

H. R. 12

Introduced Jan. 3, 1953, by Rep. Spence, To provide for the control and regulation of bank holding companies, and for other purposes; referred to the House Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

H. R. 114

Introduced Jan. 3, 1953, by Rep. Burleson, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to the House Committee on the Judiciary where it has been laid on the table (see H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

H. R. 128

Introduced Jan. 3, 1953, by Rep. Fernandez, To provide a one-year extension of the five-year limitation on the time for presenting Indian claims to the Indiam Claims Commission; referred to the House Committee on Interior and Insular Affairs where it is now pending; assigned to Committee on Natural Resources and Interior Affairs.

H. R. 131

Introduced Jan. 3, 1953, by Rep. Heselton, To provide for the separation of subsidy from air-mail pay, and for other purposes; referred to the House Committee on Interstate and Foreign Commerce where it is now pending; assigned to the Committee on Communications.

H. R. 134

Introduced Jan. 3, 1953, by Rep. Heselton, To amend the Natural Gas Act to authorize the Federal Power Commission to prescribe safety requirements for natural-gas companies; referred to the House Committee on Interstate and Foreign Commerce where it is now pending; assigned to the Committee on Gas and Electric Power.

H. R. 166

Introduced Jan. 3, 1953, by Rep. Mills, To establish a Tax Settlement Board; referred to the House Committee on Ways and Means where it is now pending; assigned to Chairman John W. Cragun.

H. R. 171

Introduced Jan. 3, 1953, by Rep. Rees of Kansas, To exempt certain functions of the Post Office Department from the Administrative Procedure Act, and for other purposes; referred to the Committee on Post Office and Civil Service where it is now pending; assigned to Committee on Communications and Committee on Administrative Procedure Act.

H. R. 196

Introduced Jan. 3, 1953, by Rep. Wickersham, To extend the time within which claims may be presented to the Indian Claims Commission; referred to the House Committee on Interior and Insular Affairs; assigned to Committee on Natural Resources and Interior Affairs.

H. R. 223

Introduced Jan. 3, 1953, by Rep. Boggs, To confirm and establish the titles of the States to lands and resources in and beneath navigable waters within State boundaries and to provide for the use and control of said lands and resources; referred to House Committee on the Judiciary where it has been laid on the table (see H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

H. R. 287

Introduced Jan. 3, 1953, by Rep. Hoffman, To provide for the separation of subsidy from air-mail pay in accordance with recommendations of the Commission on Organization of the Executive Branch of the Government; referred to the House Committee on Interstate and Foreign Commerce where it is now pending; assigned to Committee on Transportation.

H. R. 291

Introduced Jan. 3, 1953, by Rep. Hoffman of Michigan, To provide for the reorganization of the Department of the Treasury in accordance with recommendations of the Commission on Organization of the Executive Branch of the Government; referred to House Committee on Ways and Means where it is now pending; assigned to Committee on Code of Conduct for Government Employees.

H. R. 292

Introduced Jan. 3, 1953, by Rep. Hoffman of Michigan, To Provide for the reorganization of the Department of Agriculture in accordance with the recommendations of the Commission on

Organization of the Executive Branch of the Government; referred to House Committee on Agriculture where it is now pending; assigned to Committee on Administrative Procedure Act.

H. R. 297

Introduced Jan. 3, 1953, by Rep. Hoffman of Michigan, Making various changes in laws applicable to the Post Office Department in accordance with the recommendations of the Commission on Organization of the Executive Branch of the Government; referred to House Committee on Post Office and Civil Service where it is now pending; assigned to Committee on Communications.

H. R. 306

Introduced Jan. 3, 1953, by Rep. Kelly of New York, Providing that there shall be equal pay for equal work for women; referred to House Committee on Education and Labor where it is now pending; assigned to Committee on Labor and Committee on Improvement of Administrative Procedures.

H. R. 312

Introduced Jan. 3, 1953, by Rep. McDonough, To confirm and establish the titles of the States to lands and resources in and beneath navigable waters within State boundaries and to provide for the use and control of said lands and resources; referred to House Committee on the Judiciary where it was laid on the table (see H. R. 4198); assigned to Committee on Resources and Interior Affairs.

H. R. 316

Introduced Jan. 3, 1953, by Rep. McDonough, To amend the Federal Home Loan Bank Act, The Home Owners' Loan Act of 1933, title IV of the National Housing Act, and the judicial code in order to define the limitations of Government control of savings and loan associations, to provide judicial and administrative remedies, and for other purposes; referred to House Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

H. R. 337

Introduced Jan. 3, 1953, by Rep. Rodino, To authorize the issuance of three hundred thousand special non-quota immigration visas to certain refugees, persons of German ethnic origin, and natives of Italy, Greece, and the Netherlands, and for other purposes; referred to House Committee on the Judiciary where it is now pending before Subcommittee No. 1; assigned to Committee on Immigration and Naturalization.

H. R. 348

Introduced Jan. 3, 1953, by Rep. Rogers of Texas, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources

of the continental shelf lying outside of State boundaries; referred to House Committee on the Judiciary where it was laid on the table (see H. R. 4198); assigned to Committee on Resources and Interior Affairs.

H. R. 357

Introduced Jan. 3, 1953, by Rep. Willis, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to House Committee on the Judiciary where it has been laid on table (see H. R. 4198); assigned to Committee on Resources and Interior Affairs.

H. R. 384

Introduced Jan. 3, 1953, by Rep. Byrnes of Wisconsin, To provide for standards to be prescribed by the Secretary of Agriculture governing imported agricultural food products; referred to House Committee on Agriculture where it is pending; assigned to Committee on Agriculture, Food, Drugs and Related Subjects.

H. R. 408

Introduced Jan. 3, 1953, by Rep. Celler, To regulate the interception of communications in the interest of national security and the safety of human life; referred to House Committee on the Judiciary—hearings held May 4 and May 20, now pending further action; assigned to Committee on Communications and to the Special Committee on Individual Rights as Affected by National Security.

H. R. 485

Introduced Jan. 3, 1953, by Rep. Keating, To provide that each member of the bar of the highest court of a State or of a Federal court shall be eligible to practice before all administrative agencies; referred to House Committee on the Judiciary where it is pending before Subcommittee No. 1; assigned to Committee on Administrative Practitioners.

H. R. 515

Introduced Jan. 3, 1953, by Rep. Lane, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; referred to House Committee on the Judiciary where it is pending further action following joint hearing held April 14, 1953; assigned to Committee on Finality Clauses in Government Contracts.

H. R. 569

Introduced Jan. 3, 1953, by Rep. Rees of Kansas, To authorize the Postmaster General to impound mail in certain cases; referred to House Committee on Post Office and Civil Service where it is pending before a subcommittee; assigned to Committee on Communications.

H. R. 629

Introduced Jan. 3, 1953, by Rep. Tea-

gue, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to House Committee on the Judiciary where it was laid on table (See H. R. 4198); assigned to Committee on Natural Resoruces and Interior Affairs.

H. R. 990

Introduced Jan. 6, 1953, by Rep. Bennett of Florida, To amend the Administrative Procedure Act, so as to prohibit, under certain conditions, the employment of a former employee of the Federal Government by any person, concern, or government other than the Federal Government; referred to subcommittee by House Committee on the Judiciary where it is pending awaiting reports from several Departments; assigned to Committee on Administrative Procedure Act, Committee on Code of Conduct for Government Employees, and Committee on Administrative Practitioners.

H. R. 995

Introduced Jan. 6, 1953, by Rep. Budge, To amend the Defense Production Act of 1950 so as to suspend price and wage controls until the President or the Congress finds that such controls are needed; referred to House Committee on Banking and Currency where bill was laid on table as all controls were suspended; assigned to Committee on Emergency Agencies.

H. R. 1051

Introduced Jan. 6, 1953, by Rep. Miller of New York, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; pending in House Committee on the Judiciary following hearings held April 14; referred to Committee on Finality Clauses in Government Contracts.

H. R. 1285

Introduced Jan. 7, 1953, by Mr. Multer, To amend section 10(d) of the Administrative Procedure Act so as to broaden judicial relief under that section pending review of administrative action; referred to House Committee on the Judiciary where it is now pending; assigned to Committee on Administrative Procedure Act.

H. R. 1418

Introduced Jan. 9, 1953, by Rep. Small, To amend the Hatch Act to permit all officers and employees of the Government to take an active part in political management or political campaigns; referred to Committee on House Administration where it is pending before subcommittee; assigned to Committee on Code of Conduct for Government Employees.

H. R. 1744

Introduced Jan. 14, 1953, by Rep. Yorty, To provide that each member of the

bar of the highest court of a State or of a Federal court shall be eligible to practice before all administrative agencies; referred to House Committee on the Judiciary where it is pending before subcommittee; assigned to Committee on Administrative Practitioners (Identical to H. R. 485)

H. R. 1825

Introduced Jan. 16, 1953, by Rep. Jones of Illinois, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; pending before House Committee on the Judiciary following hearings held April 14; assigned to Committee on Finality Clauses in Government Contracts. (Identical to H. R. 1051)

H. R. 1839

Introduced Jan. 16, 1953, by Rep. Reed of Illinois, To permit reviews of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes; pending before House Committee on the Judiciary where reports have been requested from a member of Departments; assigned to Committee on Finality Clauses in Government Contracts.

H. R. 2117

Introduced Jan. 26, 1953, by Rep. Lyle, To provied that members of the bar of the United States District courts shall be eligible to practice before all administrative agencies; referred to House Committee on the Judiciary, where it is now pending before Subcommittee No. 1; assigned to Committee on Administrative Practitioners.

H. R. 2473

Introduced Feb. 2, 1953, by Mr. Wier, To provide for dissolution of interstate bank holding companies; referred to House Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

H. R. 2679

Introduced Feb. 6, 1953, by Rep. Bow, To amend the Natural Gas Act of 1938, as amended; referred to House Committee on Interstate and Foreign Commerce where it is now pending; assigned to Committee on Gas and Electric Power.

H. R. 2769

Introduced Feb. 6, 1953, by Rep. Wolverton, To amend section 704 of the Federal Food, Drug, and Cosmetic Act, so as to protect the public health and welfare by restoring certain authority for factory inspections; pending before House Committee on Interstate and Foreign Commerce where public hearings have been completed; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

H. R. 2928

Introduced Feb. 12, 1953, by Rep. Celler, To amend the Federal Deposit Insurance Act to provide safeguards against mergers and consolidations of banks which may adversely affect competition or unduly tend to create a

monopoly in the field of banking; referred to House Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

H. R. 2970

Introduced Feb. 12, 1953, by Rep. O'Hara of Minnesota, To amend the Interstate Commerce Act in order to expedite and facilitate the termination of railroad reorganization proceedings under section 77 of the Bankruptcy Act and to require the Interstate Commerce Commission to consider, in stock modification plans, the assents of controlled or controlling stockholders, and for other purposes; referred to House Committee on Interstate and Foreign Commerce where it is now pending; assigned to Committee on Transportation.

H. R. 3057

Introduced Feb. 16, 1953, by Rep. Bennett of Florida, To prohibit the employment by the Government of the United States of persons who are disloyal or who believe in the right to strike against the Government of the United States, and for other purposes; pending before House Committee on Post Office and Civil Service—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

H. R. 3067

Introduced Feb. 16, 1953, by Rep. Condon, To amend the Labor Management Relations Act, 1947, and for other purposes; referred to House Committee on Education and Labor where public hearings have been concluded; assigned to Committee on Labor.

H. R. 3288

Introduced Feb. 19, 1953, by Rep. Aspinall, To establish the finality of contracts between the Government and common carriers of passengers and freight subject to the Interstate Commerce Act; pending before House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Finality Clauses in Government Contracts.

H. R. 3426

Introduced Feb. 24, 1953, by Rep. Morrison, To provide for the right of appeal to the Civil Service Commission in the case of persons separated from the classified civil service for any cause other than reduction in force, and for other purposes; pending before House Committee on Post Office and Civil Service—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

H. R. 3432

Introduced Feb. 24, 1953, by Rep. Walter, To provide for attorneys' liens in proceedings before the courts or other departments and agencies of the United States; referred to House Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Practitioners.

H. R. 3551

Introduced Feb. 26, 1953, by Rep. Sullivan, To amend section 704 of the Federal Food, Drug, and Cosmetic Act,

so as to protect the public health and welfare by providing adequate authority for factory inspections; referred to House Committee on Interstate and Foreign Commerce where it is now pending; assigned to Committee on Agriculture, Food, Drugs and Related Subjects.

H. R. 3634

Introduced Mar. 3, 1953, by Rep. Celler, To amend title 28 of the United States Code so as to provide for a limited judicial review of decisions of Federal officers under "finality clauses" in Government contracts; referred to House Committee on the Judiciary where it is pending before subcommittee; assigned to Committee on Finality Clauses in Government Contracts.

H. R. 3693

Introduced Mar. 5, 1953, by Rep. Fogarty, To repeal section 10 of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (the so-called Walsh-Healey Act); Pending before House Committee on the Judiciary—no action scheduled; assigned to Committee on Labor.

H. R. 3707

Introduced Mar. 5, 1953, by Rep. Priest, To amend the Natural Gas Act of 1938, as amended; pending before House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Gas and Electric Power.

H. R. 3898

Introduced Mar. 11, 1953, by Rep. Wolcott, To amend section 202(e) of the Federal Power Act, with respect to the jurisdiction of the Federal Power Commission over persons and facilities engaged in the transmission or sale of electric energy to foreign countries pending before House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Gas and Electric Power.

H. R. 3977

Introduced Mar. 16, 1953, by Rep. Clardy, To amend the Communications Act of 1934, as amended, to provide that station licenses shall be issued for an indefinite term, and shall be revoked only by the United States District Court for the District of Columbia, and for other purposes; pending before House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Communications.

H. R. 4198

Introduced Mar. 25, 1953, by Rep. Graham of Pennsylvania, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters and to provide for the use and control of said lands and resources and the resources of the outer Continental Shelf; referred to the Committee on the Judiciary; passed House of Representatives Apr. 1; passed Senate with amendments May 5; House adopted H. Res.

232 agreeing to Senate amendments May 13; approved by the President May 22; Public Law No. 31, 83d Congress.

H. R. 4504

Introduced Apr. 13, 1953, by Rep. Wolverton, To amend section 22 of the Interstate Commerce Act, so as to establish the finality of contracts between the Government and common carriers of passengers and freight subject to the Interstate Commerce Act; pending before the House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Finality Clauses in Government Contracts. (Similar to S. 906.)

H. R. 4901

Introduced Apr. 28, 1953, by Rep. Miller of Nebraska, To amend the Federal Food, Drug, and Cosmetic Act, as amended, by providing for the regulation of chemical additives in food to insure that such chemical additives has been adequately pretested and declared safe; pending before House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

H. R. 5055

Introduced May 7, 1953, by Rep. Hale, To amend sections 401 and 701 of the Federal Food, Drug, and Cosmetic Act so as to simplify the procedures governing the establishment of food standards; pending before House Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

H. R. 5063

Introduced May 7, 1953, by Rep. Price, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; referred to House Committee on the Judiciary where it is pending before Subcommittee No. 5; assigned to Committee on Finality Clauses in Government Contracts.

H. R. 5141

Introduced May 12, 1953, by Rep. Hill, To create the Small Business Administration and to preserve small business institutions and free, competitive enterprise; Passed House June 5, 1953 (H. Report No. 494); pending before Senate Committee on Banking and Currency; assigned to Committee on Emergency Agencies.

H. R. 5740

Introduced June 15, 1953, by Rep. Wolverton, To amend the Federal Food, Drug, and Cosmetic Act, so as to protect the public health and welfare by providing certain authority for factory inspection, and for other purposes; reported by House Committee on Interstate and Foreign Commerce, H. Report No. 708; assigned to Committee on Agriculture, Food, Drugs and Related Subjects.

House Joint Resolutions

H. J. Res. 11

Introduced Jan. 3, 1953, by Rep. Boggs, To provide the power of subpena and

to grant immunity in certain investigations relating to improper and illegal conduct in the transaction of the business of the Government of the United States, and for other purposes; referred to House Committee on the Judiciary where it is now pending; assigned to Chairman and Vice-Chairman of Section.

H. J. Res. 126

Introduced Jan. 13, 1953, by Rep. Feighan, To provide for the continuance of certain mineral leases issued by the States covering the submerged lands of the Continental Shelf and for the issuance of certain other mineral leases on such lands by the United States, to provide that the royalties from such leases shall be used for grants-in-aid of education and national defense, and for other purposes; referred to House Committee on the Judiciary where it was laid on table (see H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

House Concurrent Resolutions

H. Con. Res. 2

Introduced Jan. 3, 1953, by Rep. Bennett of Florida, That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including office holders; referred to House Committee on Post Office and Civil Service where it is now pending—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

H. Con. Res. 10

Introduced Jan. 3, 1953, by Rep. St. George, That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government officials and employees, including officeholders; referred to House Committee on Post Office and Civil Service where it is now pending—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

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Rufus G. Poole
Chairman, National Committee

L. Clair Nelson
Vice-Chairman, National Committee

REPORT OF COMMITTEE ON ADMINISTRATIVE PRACTITIONERS, ADMISSIONS AND ETHICS

1. *The Administrative Practitioners and Ethics Bill:* The work of this Committee has again centered around the proposals for legislation embodied in this Bill, which has the approval of the Section and the Association and, as this is written, is on the point of being introduced into Congress. Its title has been changed so as to include the words "and Ethics", in an endeavor to make clear that that subject is equally involved. We have worked closely with John D. Randall and Thomas J. Boodell of the Standing Committee on the Unauthorized Practice of Law, in connection with this Bill.

To recapitulate the Bill would (1) subject practitioners before administrative agencies to the Canons of Professional Ethics of the American Bar Association insofar as they may be applicable to administrative practice; (2) prohibit non-lawyers from serving as trial counsel in litigation before administrative agencies which is essentially comparable to litigation in the courts, but with a "grandfather clause" permitting, in the discretion of the particular agency, those laymen presently engaged in such practice to continue; (3) provide for the supervision of persons engaged in administrative practice by an Administrative Practitioners Council empowered (a) to issue credentials to attorneys-at-law in good standing entitling them to practice before all administrative agencies except the Patent Office, and (b) to revoke, for good cause shown, subject to judicial review *de*

novo, the right of any person to practice before an administrative agency; (4) provide for recognition by the agencies of attorneys-at-law holding credentials who have filed a Notice of Appearance; (5) leave the matter of admission to practice of laymen apart from trial work in litigation, to the agencies themselves. The right of the agencies to discipline any person practicing before them is specifically retained, except that it is made subject to judicial review *de novo;* and (6) vest the Federal Courts with jurisdiction to discipline attorneys-at-law for conduct which occurs in practice before Federal administrative agencies.

Thus the Bill would set up machinery fully equipped to reach and prevent the influence-peddling, solicitation and other undesirable practices which have resulted from the present gap in the law which has permitted persons to engage in administrative practice without adequate supervision. The general approach of the Bill is to endeaver to extend to the "cherished judicial tradition" described by Mr. Chief Justice Hughes in *Morgan* v. *United States* (1938) 304 U.S. 1, to administrative litigation; and the traditional responsibility of the legal profession to administrative practice generally.

Some background on this subject is set forth in a Report by the Chairman of this Committee for the Survey of the Legal Profession, "Standards of Admission for Practice Before Federal Administrative Agencies" (Prentice-Hall, 1953), which was prepared with the valuable assistance of Members of this Committee and the Section.

Introduction into Congress of the Administrative Practitioners and Ethics Bill, however, has been held up in an endeavor to obtain the support of all interested groups. Apparently one layman group will oppose it, on the theory that laymen should be permitted to serve as trial counsel in adversary administrative proceedings. Hence the legal profession as a whole should realize that we may be heading into a full-dress fight over whether laymen should be permitted to serve as trial counsel in administrative litigation which is substantially similar to litigation in the Courts. In the view of this Committee, that issue is crucial to the future of the legal profession, and must be answered in the negative if the value of legal learning and ethical conduct is to be recognized in the field of administrative law.

2. *Proposed Revision of Treasury Department Circular No. 230:* Pursuant to a request from I. W. Carpenter, the Director of Practice of the Treasury Department, for recommendations concerning revision of this Circular a proposed Memorandum was prepared, circulated and approved by this Committee and the Standing Committee on the Unauthorized Practice of Law, and submitted to Mr. Carpenter. A copy follows:

American Bar Association

MEMORANDUM RE PROPOSED REVISION OF TREASURY DEPARTMENT CIRCULAR NO. 230

Introduction

I. W. Carpenter, the new Director of Practice of the Treasury Department, has written the undersigned, asking for the

suggestions of the American Bar Association with regard to the general revision of this Circular which is presently contemplated by the Department. A draft of this memorandum has been aproved by the Committee on Administrative Practitioners and Ethics of the Administrative Law Section and the Standing Committee on the Unauthorized Practice of Law.

1. ESSENTIAL FACTUAL BACKGROUND:

There is certain factual background which bears directly upon this subject. The fact of fundamental and far-reaching importance is that the problems connected with admission to practice before federal administrative agencies appear to be laymen-created problems. Laymen are not subject to judicial discipline and the supervision of Bar Associations, with the result that they have long engaged in practices before administrative agencies which lawyers could not engage in without penalty of disbarment or other judiical discipline. This lack of supervision appears to have been the basic cause of influence-peddling, solicitation, etc. over the years. Beginning about 1884, because of trouble with these problems Congress began, in a general way, to pass the matter of supervision of laymen in administrative practice to the various agencies. The history of the origin of practice by laymen before administrative agencies, and the scope of administrative supervision over them, is outlined, to some extent, in "Standards of Admission for Practice Before Federal Administrative Agencies", a booklet published by Prentice-Hall and a Report by the writer for the Survey of the Legal Profession, page 10, *et seq.* The Interstate Commerce Commission has had a particularly strenuous exi perience with laymen.

The second point of importance is that lawyers are subject to judicial discipline and the supervision of Bar Associations, and experience has shown that unethical practice by lawyers before federal administrative agencies are very rare indeed (See "Standards of Admission", etc., page 23).

II. BASIC PRINCIPLES WHICH SHOULD GOVERN THE PRACTICE OF LAWYERS BEFORE ADMINISTRATIVE AGENCIES:

There are certain basic principles which should be recognized as logically applicable to the practice of lawyers before administrative agencies. These principles are:

A. *The Agencies Should Accord to Lawyers the Basic Responsibility Which the Courts Accord Them:* The Courts expect honorable conduct, respectability, and responsibility from the lawyers who appear before them, for the reason that if lawyers do not live up to those standards of honor, respectability and responsibility, they will be disbarred, suspended or censured. These standards of the legal profession apply to practice by lawyers before administrative agencies, as well as elsewhere. See *People* v. *Patterson,* 138 P. 30, 56 Colo. 296. Accordingly, it would seem that administrative agencies should accord to lawyers that same expectation of honorable conduct, respectability and responsibility.

B. *No Administrative Restrictions Should Be Placed Upon the Practice of Law*

by Lawyers: Nearly all that a lawyer does before an administrative agency in a representative capacity consists of the practice of law. Since he is subject to the Canons of Professional Ethics, judicial discipline and the supervision of Bar Associations generally, it would seem that administrative agencies should not endeavor to place restrictions upon him which go beyond these requirements. Placing additional restrictions upon him only slows up the lawyer's work; causes him additional expenditure of time, annoyance, and additional expense to the client; and appears to serve no useful purpose. Enforcement of the Canons of Professional Ethics and judicial discipline should be enough. The Canons of Professional Ethics of the American Bar Association are available to everybody, being published in Volume II of Martindale Hubbell's Law Directory.

III. SPECIFIC SUGGESTIONS FOR DEPARTMENT CIRCULAR NO. 230.

A. *No Application for Admission to Practice Should Be Required of a Lawyer:* If a lawyer is in good standing as a member of a State or Federal Bar, that fact should entitle him, *ipso facto,* to practice before every federal administrative agency except the Patent Office. Accordingly, lawyers should not be required to apply for permission to practice before the Treasury Department, although a lawyer's right to practice before the Department should be revokable by the Department for a breach of the Canons of Professional Ethics.

B. *No Separate Code of Ethics Should Be Established for Lawyers:* Circular No. 230 should not endeavor to set up a code of ethics for lawyers, different from or in addition to those of the legal profession. Instead, it should suffice for the Department to continue the present provision requiring lawyers to abide by the Canons of Professional Ethics of the American Bar Association.

C. *Notices of Appearance Instead of Powers of Attorney:* As set forth in "Standards of Admission", etc., pages 23, 24, there does not appear to be any reason for requiring a lawyer to file a power of attorney in order to establish that he represents a client. There are many instances in the experience of practicing lawyers where obtaining a power of attorney from a client who is ill, traveling, etc. has caused great difficulty, annoyance and expense.

We suggest that, as in the Courts, a Notice of Appearance should be accepted by the Treasury Department as the orthodox and most effective form of documenting the lawyer's authority. It is a written representation by the lawyer that he is authorized to appear, buttressed by the potent legal presumption that a lawyer is authorized to represent the person whom he professes to represent. It is simple, effective and inexpensive from the lawyer's standpoint. If in protracted negotiations with the Treasury Department several lawyers should appear, each could be asked to sign a Notice of Appearance on behalf of the same firm or separately. It may sometimes be desirable to obtain repeated Notices of Appearance.

From the standpoint of the Treasury Department, this system would provide a more or less automatic or self-executing method of preventing lawyers who have been dis-

barred, convicted of crime, etc., or who are otherwise no longer in good standing, from continuing to appear. No non-lawyer could file a written Notice of Appearance in which he represents that he is a lawyer without becoming liable to prosecution for the unauthorized practice of law. If a lawyer should make a misrepresentation in such a Notice of Appearance, he could be both (1) subject to judicial discipline and (2) in violation of 18 USC 287, prohibiting the making or presenting of false claims. Also, requiring Notices of Appearance would place the administrative burden on those persons who appear rather than on the Department itself. It would be far less expensive for Treasury as well as far more effective. A proposed form of Notice of Appearance is attached hereto.

D. *Statement as to Contingent Fees:* A lawyer should not be required to file a statement as to whether his fee is contingent, and the details thereof, in a case before the Treasury Department, any more than he should in a case before the Courts. Also, it does not seem appropriate for the very agency which makes a tax assessment to pass upon the fee of the lawyer who is to contest it. Finally, the subject of fees appears to be fully covered by the Canons of Professional Ethics.

E. *Associations and Firms:* As presently provided, a bona-fide law partnership should be permitted to appear before the Treasury Department just as it may appear in a judicial proceeding. With regard to associations of lawyers which are not bona-fide partnerships, but which practice under the names such as "Smith, Brown and Jones, Attorneys at Law", there does not appear to be any real purpose to be served by preventing such an association from appearing in the firm name before administrative agencies, as it may before the Courts. Each member thereof undoubtedly holds himself out as a member of the firm, and each would thus be legally responsible to a client in cases of malpractice, etc. We do not believe there is a problem here that warrants different treatment.

F. *Specific Sections of Circular No. 230:*

1. 10.2 (c) This would appear to be covered by the Cannons of Ethics and the foregoing, and so unnecessary to apply to lawyers. As this reason will be repeated, hereafter such reason will only be stated with the word "unnecessary."

2. 10.2 (d), (e). Unnecessary. See above.

3. 10.2 (f). Satisfactory.

4. 10.2 (g). We suggest that it would be preferable to apply to documents submitted to the Treasury Department, the requirements of Rule II of the Federal Rules of Civil Procedure. These require that every pleading of a party represented by an attorney-at-law shall be signed by at least one attorney-at-law in his individual name, in ink, such signature to constitute a certificate by the attorney-at-law that he has read the pleading, that there is good ground to support it, and that it is not interposed for delay. If an attorney-at-law so signs a pleading with the intent to defeat the purpose of the rule, he may be subjected to "appropriate disciplinary action."

5. 10.2 (i). Probably satisfactory as is.

6. 10.2 (j). This would be obviated by requiring a Notice of Appearance instead of a Power of Attorney.

7. 10.2 (k). This would be obviated by requiring Notices of Appearance.

8. 10.2 (l). Satisfactory.

9. 10.2 (m). (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x) and (y). Unnecessary. See above.

10. 10.2 (z). We suggest that this be slightly revised so as to state that each attorney-at-law practicing before the Treasury Department shall be bound to observe the Canons of Professional Ethics of the American Bar Association and that he may be subjected to appropriate disciplinary action by the Treasury Department for a breach thereof.

11. 10.3 We suggest that this be revised so as not to require attorneys-at-law to apply for admission to practice before the Treasury Department. The Department may, however, desire to keep a register of attorneys-at-law who practice before it.

12. 10.4 See comments re 10.3.

13. 10.5 through 10.13. No comments except as set forth above.

F. Trowbridge vom Baur, Chairman
Committee on Administrative
Practitioners, Admissions & Ethics,
Administrative Law Section,
American Bar Association.

June 15, 1953.

TREASURY DEPARTMENT

NOTICE OF APPEARANCE BY ATTORNEY-AT-LAW

Dated: .....

Please take notice that the undersigned attorney(s)-at-law represent(s) and hereby appear(s) for

.....

(Name of Client)

Whose address is:

.....

(Address of Client)

In connection with

.....

(State Nature of Matter)

.....

The undersigned is (are) an attorney(s)-at-law in good standing of the Bar(s) of the highest Court of .....

.....

(State Jurisdictions in which admitted, State or Federal)

.....

(Name of Attorney-at-Law Firm

By .....

(lawyer executing Notice of Appearance)

Please send all communications to me (us) at the following address:

.....

(NOTE: Persons and firms appearing must be admitted to practice before the highest Court of a State or Territory, a Federal District Court or Court of Ap-

peals, or the Supreme Court of the United States.)

3. *Statutory Limitations on Fees for Legal Services Rendered Before Administrative Agencies*: Prompted by a comprehensive report of the Special Committee to Investigate Statutory Limitations on Attorneys' Fees of the New York State Bar Association, dated January 27, 28, 1950, this subject was referred to our Committee. As set forth hereinafter, we are opposed to statutory limitations on legal fees for services rendered before administrative agencies for the following reasons:

A. *No Instance* of charging unreasonably-high legal fees for services rendered before administrative agencies has come to the attention of this Committee. If any such problem should arise, Bar Associations and judicial discipline provide the primary forums for disposing of them. Also, the proposed Administrative Practitioners and Ethics Act, by making the Canons of Professional Ethics applicable to representation in administrative practice would further prohibit the charging of unreasonable fees.

B. *The Specific-Sum Fee Limitations are So Low* as to discourage any lawyer, let alone the abler members of the Bar, from representing the claimants at all. 38 USC 101-1116, and 551, and Rule 5655 of the applicable Rules and Regulations of the Veterans Administration contain truly extraordinary provisions. They limit to $2.00, $3.00 and $10.00, fees for legal services in connection with claims against the Veterans Administration, and to $25.00 fees for pension claims services. An attorney was held limited to a fee of $3.00 for successfully pressing a claim in excess of $12,000.00, requiring, among other things, travel from New York to Washington. He was convicted in a criminal prosecution and fired, for accepting a fee greater than $3.00, *Margolin* v. *United States* (1925) 269 US 93. In *Hines* v. *Lowrey* (1938) 305 US 85, a New York State Court allowed $1,500.00 to an attorney for legal services rendered to an incompetent veteran. The attorney had obtained, without litigation, payment of an amount of war risk insurance in excess of $10,000.00. The Supreme Court of the United States held that the Federal statute required a reduction of the lawyer's fee to $10.00.

Companion provisions in the regulations and forms of the Veterans Administration make additionally clear that there is an administrative policy of discouraging the legal representation of claimants. Rule 5649 provides that attorneys "shall not be furnished with supplies of VA forms but will be required to have them printed at their own expense". And on Veterans Administration forms claimants are informed that "it is not necessary" to employ a lawyer to assist in prosecuting a claim. The right or authority of an administrative agency to make such a representation to claimants generally is by no means clear. They may be serious misrepresentations in some cases. Whether legal representation is necessary can only be decided by a qualified lawyer in each individual case.

C. *Where The Agency Is The Adversary*: The specific-sum limitations on fees for legal services have been enacted in statutes under which the agency (the Veterans

Administration) is the adversary, as well as the judge, in the proceeding. In discouraging legal representation, this necessarily tends to give the agency *carte blanche,* and to make arbitrary or poorly-considered administrative action easy.

D. *In Contrast: Legal Fees for Representing the VA*: When the VA seeks legal representation on its own behalf, however, it authorizes the payment of very substantially higher fees to the lawyers who represent it, notably $10.00 per hour for representation in contested litigation.

E. *Percentage Limitations*: There are also statutory limitations, to a percentage of amount recovered, on legal fees for services rendered before administrative agencies. These generally limit the fee to 10% of the recovery in a given case, Federal Tort Claims Act, 28 USC 2678; Mexican Claims Act of 1942, 56 Stat. 1060; War Claims Act, 50 USC App. 2009; and Trading with the Enemy Act, 50 USC App. 16, 20. There is a limitation of 5% under the Philipine Rehabilitation Act of 1946, 50 USC App. 1758.

F. *Limitation to A Sum Approved by The Agency*: Other statutes limit legal fees for services rendered in administrative proceedings to a sum approved by the agency. Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901; War Risk Hazard Act, 42 USC 1714; Railroad Unemployment Insurance Act, 45 USC 351, 355(i); and Contracts with Indians, 25 USC 81. These statutory provisions are often administered by non-lawyers, and do not inspire confidence. They are further deterents to legal representation and the skilled presentation of a case in administrative practice.

G. *Reasons for Statutory Limitations on Fees: Practice by Non-Lawyers*: Incredible though these fee limitations, or some of them, may seem to lawyers, there appear to be definite reasons for their existence which should be understood. Statutory fee limitations to $10.00 for legal services rendered before Federal administrative agencies go back a long time, to the period after the Civil War, in which administrative law had its major burst of initial development. At that time non-lawyers started to represent others in the prosecution of claims before administrative agencies, simply because Congress had failed to prohibit it when the claims were created, and the Courts had no jurisdiction. See "Standards of Admission For Practice Before Federal Administrative Agencies", pages 9-16. The reason for this Congressional action appears, quite clearly, to have been inadequate supervision over non-lawyer practitioners and the unscrupulous conduct that some of them had engaged in before administrative agencies, as a result. The specific-sum limitations on fees were undoubtedly aimed at these unscrupulous non-lawyers. They have been made applicable to lawyers also because lawyers and laymen have unfortunately, been lumped together, indiscriminately, in the regulation of practice before the agencies is concerned. The passage of the Administrative Practitioners and Ethics Bill above described, by extending the great traditions and responsibility of the legal profession to administrative practice, and by providing adequate supervision over administrative practition-

ers, would afford an activating reason for the repeal of statutory limitations on fees for legal services rendered before administrative agencies.

Summary Of This Section: The statutory limitations on fees for legal services rendered before administrative agencies (1) bear no relation to the work performed, and (2) have the overall effect of making legal representation and the skilled presentation of a case difficult or impossible for the claimants affected. They are unfair to both lawyer and client, and should be repealed. Responsibility for the charging of reasonable fees should be placed, first, upon the lawyer himself, with an expectation of honorable conduct; and second, on those bodies primarily responsible for enforcing the Canons of Professional Ethics, that is, Bar Associations, the Courts, and the Administrative Practitioners Council provided for in the Administrative Practitioners and Ethics Bill.

F. Trowbridge vom Baur, Chairman

July 1, 1953.

REPORT OF COMMITTEE ON ADMINISTRATIVE PROCEDURE ACT

During the current year various bills, of the 83rd Congress, which refer in whole or in part, to the Administrative Procedure Act have been assigned to this Committee. Your chairman, in turn, has assigned them for study to various committee members.

The bills assigned are:

S.18, S.26, S.1491, S.1501, and S.1708; and

H.R.171, H.R.292, H.R.990, and H.R.1285. A check of the status of these bills as of the current date (to May 1, 1953) shows that no consideration has been given or hearings held on any of these bills except S.18. It is identical to S.1770 of the 82d Congress.

On March 20, 1953, Senator Langer, Chairman of the Senate Committee on Judiciary reported favorably for his Committee on S.18 by Senate Report No. 111, 83rd Congress. He points out that the bill's purpose was to remove various exemptions from the Administrative Procedure Act, which were either in Section 2(a) of the original Act or in exclusions provided in seven subsequent Acts. The report summarizes from the earlier report on S.1770, and from prior reports of officers of the American Bar Association and by predecessors of this Committee as to the broad and effective protection which the Administrative Procedure Act was intended to afford, and as to their support of the prior bill, S.1770.

Your Committee joins in the recommendations of its predecessors, and of the Senate Committee on Judiciary, in urging prompt enactment of S.18.

An added matter of moment for our Committee has just been presented. On April 29, 1953, the President of the United States issued a notice to all Executive Departments and Administrative Agencies requesting the Attorney General and the various departments and agencies to call a conference looking to the elimination of unnecessary delay, expense and voluminous records in adjudicatory and rule-making

proceedings. The last retiring chairman of the Section of Administrative Law is made one of the private lawyer members of the Conference.

A copy of the President's notice and of an enclosed letter to the President from the Chief Justice of the United States suggesting the Conference are attached to and made a part of this report.

Your Committee endorses the stated objectives and purposes of the President's Conference, and offers its assistance, during the ensuing period of study, analysis and report.

Respectfully submitted,
Albert E. Stephan, Chairman

C O P Y C O P Y C O P Y

Immediate Release April 29, 1953

James C. Haggerty, Press Secretary
to the President

THE WHITE HOUSE

To All Executive Departments and Administrative Agencies:

I am in receipt of a communication from the Chief Justice of the United States, in his capacity as Chairman of the Judicial Conference of the United States, concerning unnecessary delay, expense and volume of records in some adjudicatory and rule-making proceedings in the Executive Departments and Administrative Agencies. I attach a copy of that letter.

The suggestion there transmitted has the endorsement of the Attorney General. It affords opportunity for a public service of benefit to both citizens and Government. Accordingly, I am happy to call a conference of representatives of the departments and agencies, and of the judiciary and the bar, for the purpose of studying the problems thus described.

It is not contemplated that the conference will attempt to impose rules or procedures upon the departments, the agencies, or litigants. The purpose is to exchange information, experience and suggestions and so to evolve by cooperative effort principles which may be applied and steps which may be taken severally by the departments and agencies toward the end that the administrative process may be improved to the benefit of all.

I request the Attorney General to cause a list to be prepared of those departments and administrative agencies which have these functions, and to transmit to each of those listed a copy of this call, I also request him to designate, in addition to a delegate, a representative of his Department to act as Secretary of the conference.

I request each department and agency receiving this call from the Attorney General to designate a representative to meet with other such representatives as delegates in a conference for the purposes I have designated. I request that in designating representatives for these purposes care be taken to name persons who will undertake to devote to the work the considerable time which probably will be required.

With the agreement of the Chief Justice, I have invited Circuit Judge E. Barrett Prettyman, of the United States Court of Appeals for the District of Columbia, Judge Morris A. Soper of the United States Court

of Appeals for the Fourth Circuit, Baltimore, and Associate Judge Walter M. Bastian of the District Court of the United States for the District of Columbia, to participate in the conference, and have requested Judge Prettyman to act as Chairman.

I am requesting J. Earl Cox, Jay D. Bond, and William F. Scharnikow, all of Washington, D. C., who are federal trial examiners of experience, to attend and participate as members of the conference.

I am also inviting the following lawyers, experienced in the field of administrative law, to attend and participate as members of the conference:

Hon. John A. Danaher, Washington, D. C.

Richard S. Doyle, Esq., Washington, D. C.

Edmund L. Jones, Esq., Washington, D. C.

H. Cecil Kilpatrick, Esq., Washington, D. C.

Wilbur R. Lester, Esq., Washington, D. C.

Breck P. McAllister, Esq., New York, N. Y.

George M. Morris, Esq., Washington, D. C.

Prof. Charles B. Nutting, Pittsburgh, Pennsylvania.

Garnet L. Patterson, Esq., Akron, Ohio.

John R. Turney, Esq., Washington, D. C.

J. Albert Woll, Esq., Washington, D. C.

Joseph W. Wyatt, Esq., Washington, D. C.

The secretary of the conference will announce the time and place for the initial meeting of the conference. Thereafter, the conference will organize and fix its program and procedure. After the program which seems initially possible has been completed, provisions may be made by the conference for further meetings from time to time. Should a member of the conference be unable to continue in attendance, the vacancy may be filled by the authority which originally designated the retiring member.

I shall be happy to receive from time to time reports from the conference as to its work.

Dwight D. Eisenhower

The White House
Washington, D. C.

April 28, 1953.

COPY COPY

March 24, 1953

My dear Mr. President:

Some time ago, the Judicial Conference of the United States undertook to examine into the causes of long delay, great expense, and voluminous records in certain classes of cases, including some which reach the courts from the executive departments and administrative agencies.

A committee of judges and an advisory committee composed of representatives of the agencies and of the bar presented a report to the Conference at its September 1951 session, and that report was approved. The findings were that, while the number of such cases is not large, those in which unnecessary delay, expense and volume of record occur create a serious problem in the

administration of justice, that the problem should be considered by the departments and agencies, and that a cooperative approach to it affords the best promise for remedy.

Pursuant to a resolution of the Judicial Conference, I have the honor to transmit a suggestion that you call a conference of representatives of the executive departments and administrative agencies having adjudicatory functions, for the purpose of studying cooperatively possible steps to remedy the conditions which were the subject of the report. It is further suggested that representatives of the bar and members of the judiciary, in such numbers and in such capacity as you may deem appropriate, might well be included in such a conference.

I venture to add my own view that the suggested conference appears to be a practical step toward remedying a condition which impedes the economical and efficient determination of serious controversies between citizens and the Government. The excessive time consumed, of course, diminishes the court hours for all other cases and necessarily impedes their determination. I, therefore, personally endorse it.

Copies of the report to the Judicial Conference are available for your information.

Sincerely,

Fred M. Vinson
Chief Justice

The President
The White House

COMMITTEE ON FEDERAL TRIAL EXAMINERS

Any committee report pertaining to Federal Trial Examiners, written as of June 1953, must highlight the following developments of the past year.

1. Introduction of S. 1708 to amend Section 11 of the Administrative Procedure Act providing for Presidential appointment of trial examiners ("administrative judges").
2. Decision of the United States Supreme Court in *Federal Trial Examiners Conference* v. *Ramspeck*, ... U.S. ....., 97 L. ed. (Adv. p. 445) (March 16, 1953), upholding the validity of the Civil Service Commission regulations governing trial examiners.
3. Trial Examiner aspects of the President's Conference on Administrative Procedure, appointed to inquire into undue delay, length and expense of hearings before administrative agencies.
4. Trends in *de facto* status and function of hearing examiners in conducting and reporting agency cases of adjudication.

Section 1708. This Bill was introduced on April 21, 1953 by Senator McCarran, Chairman of the Senate Judiciary Subcommittee on Improvement in Judicial Machinery (99 *Cong. Rec.* 3581). With its introduction there is now brought into sharp focus the issue whether agencies shall control the appointment, tenure and compen-

sation of Federal Trial Examiners. Actually, the Bill revives this issue which in 1941, was of most concern to the Attorney General's Committee, to the American Bar Association, and, for that matter, to certain Congressional Committees. The high importance of this subject has prompted your Committee to make a definitive recommendation, and to associate therewith an expression of different views and various suggestions. The overriding purpose of this separate submission is to assist the Section in arriving at an informed position on the Bill.

The President's Conference. The scope of this Conference covers matters other than trial examiners and is of primary concern to the committee on Improvement of Administrative Procedure. It is mentioned here because the status of trial examiners is one of the important subjects of inquiry. The make-up of this Conference (which was announced April 29, 1953) includes besides judiciary participation, a panel of agency representatives, a panel of the Bar, and a panel of Federal Trial Examiners. It may be expected that this Conference will have important implications for hearing examiners and this Section.

The Ramspeck Case. With the March 9, 1953, decision of the United States Supreme Court in this case, the frontal attack on the statutory validity of the Civil Service Commission's regulations governing hearing examiners was turned back by a split decision (6-3). The regulations, with one minor exception, had theretofore been declared invalid by the United States District Court for the District of Columbia (104 F. Supp. 734) which judgment was affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit (202 F. 2d 312). Of the thirteen Judges who considered the case, the aggregate opinion on the validity of the regulations was 7 for and 6 against. With the litigation phase of this issue brought to a conclusion by affirmance of the Commission's regulations in all respects, the center of attention has shifted to the Executive and Legislative Branches. The reorganized Civil Service Commission, as of June, 1953, has not undertaken any re-appraisal or re-evaluation of the contested regulations. This was due primarily to time pressures and the attention required of staff members by other pressing matters.

Trends. There are about 300 Trial Examiners within some 19-21 "agencies" of the Federal Government. There have been no significant changes in numbers, duties or procedures during the past year. The Civil Service Commission Register has remained virtually dormant, with the exception of a few recent appointments by the National Labor Relations Board from the open competitive register. This agency has added about 10 examiners to its staff. The Federal Communications Commission has increased its staff of members from 7 to 12; this number would be more than doubled were proposals presently pending in Congress, designed to expedite the handling of television applications effectuated. No examinations have been held for Trial Examiner positions since 1949. Addition to the register is possibly only for disabled veterans. There continues to be a five grade spread of trial examiners positions as follows:

GS-11	$ 5,940 - $ 6,940
GS-12	$ 7,000 - $ 8,040
GS-12	$ 8,360 - $ 9,360
GS-14	$ 9,600 - $10,600
GS-15	$10,000 - $11,800

There are only two agencies which have examiners in the lower grade: the Bureau of Indian Affairs and the Interstate Commerce Commission, Motor Carrier Cases. The only grade in which there has been any appointment activity is GS-13. Examiners receive automatic ingrade promotions of $200 each year and a half. Perhaps the most significant development has been the commencement by the Civil Service Commission of job-classification desk audits. In the three agencies where this work has been completed, there has resulted a raised classification of the Federal Trade Commission from 14 to 15, of Agriculture from 14 to 15 and of the Coast Guard from 12 to 13. The trend to date has been to increase compensation and consolidate the positions into a single grade.

Of existing trial examiner positions, the most recent increase was the addition of some 67 examiners to adjudicate Motor Carrier Cases under the Interstate Commerce Commission, as a result of the *Riss Case*, 341 U.S. 907. Looking to the future there is pending legislation (S.18) which would repeal exemptions from the Administrative Procedure Act. There are 12 such exemptions whose repeal would add to the number of agencies subject to the Act, and would in some cases, require appointment of trial examiners under Section 11. Account should also be taken of bills pending in Congress such as S. 106 to establish a Commission on Organization of the Executive Branch of the Government. This Commission would be a successor organization to the Hoover Commission, with one important distinction. It would have the power to inquire into the policy question of whether a particular agency function should be continued or performed. While such a Commission would be primarily concerned with management and fiscal matters and the organizational structure of agencies, it is reasonable to expect that its proposals would have an important effect on administrative procedures and matters of concern to this Section. From the limited standpoint of agency procedures and trial examiners, there is in prospect double-pronged inquiry—the President's Conference and the Congressional Commission.

A precise list of agencies, consistent with the definition of that term in the Administrative Procedure Act, which utilize section-11 trial examiners, is not in existence. This is due to the fact that "agency" as used in section 2 of the Act embraces any authority, officer or board whether "within another agency or not, which by law has the authority to take final and binding action and with or without appeal to some superior administrative authority." For example, the different divisions of the Interstate Commerce Commission and the Judicial Officers of the Department of Agriculture were considered by Congress to be separate "agencies". A list of section-11 trial examiner agencies is as follows:

I. DEPARTMENTS

1. Agriculture Department
   a. Secretary of Agriculture

b. Judicial Officer
c. Production & Marketing Administrator

"Commerce Department)
(Federal Maritime Board) — See "Independent Agencies" list.

2. Interior Department
   a. Secretary
   b. (Commissioner, Bureau of Indian Affairs)
   c. (Director, Bureau of Land Management)
3. Labor Department
   a. Secretary
   b. Administrator, Wake & Hour, and Public Contracts Division
4. Post Office Department
   a. Postmaster General
5. Treasury Department
   a. Alcohol Tax Unit
   b. Coast Guard
6. Department of Welfare and Education
   a. Secretary
   b. Commissioner, Food & Drug Administration)
   c. (Commissioner, Social Security Administration)

II. INDEPENDENT AGENCIES

1. Civil Aeronautics Board
2. Civil Service Commission
3. Federal Communications Commission
4. Federal Maritime Board
   (This Board is an independent agency with respect to Shipping Act cases and Merchant Marine Act cases. With respect to subsidy cases, the Secretary of Commerce or Maritime Administrator is probably the "agency".
5. Federal Power Commission
6. Federal Trade Commission
7. Interstate Commerce Commission
8. National Labor Relations Board
9. Securities and Exchange Commission
10. Subversive Activities Control Board
11. Veterans Education Appeals Board

The case adjudication procedures and activities of trial examiners in the better known independent agencies (the CAB, FCC, FPC, FTC, ICC and NLRB), are matters concerning which members of the Section are well informed. With respect to the various agencies within departments and other lesser-known independent agencies, there follows a summary tabulation indicating generally their activities and procedures. This tabulation is not intended to be definitive or absolutely authentic in any particular detail:

I. AGENCIES WITH DEPARTMENTS

Agriculture Department

This agency has five examiners, all of one grade, who have been upgraded to the top GS-15. They form a pool of hearing officers for two or possibly three agencies in handling cases under five or more separate statutes. Principal statutes are Marketing Agreement Act, Packers and Stockyards Act, and Commodity Exchange Act. Others include the licensing of warehouses and

even includes perishable products. As to some matters, the Secretary is the agency. The Judicial Officer of the Department is the agency as to cases under the Schwellenbach Act. Some orders are issued by the Production and Marketing Administrator. Cases are assigned by the Chief Hearing Examiner. The presiding examiner issues a preliminary decision.

Interior Department

This department has nine examiners in Indian cases and one examiner in Land Management cases. The Indian cases are those involving probate of wills. The other class of cases are licenses under the Taylor-Grazing Act. Actually these cases are appeals from the denial of licenses. The Secretary is the agency as to these matters. The examiner decisions, as a practical matter in most cases, are final.

Labor Department

The Labor Department has two hearing examiners. These cases involve Walsh-Healy Act complaints under government supply contracts, wage orders under the Fair Labor Standards Act (at least with regard to Puerto Rico), and wage orders under the Davis-Bacon Act in government construction contracts. (The Fullbright amendment placed Walsh-Healy complaint cases under the Administrative Procedure Act). With regard to these cases, the examiner's decision is final except for possible review by the Secretary. In the other cases —which are more in the order of rule making or investigations—the record is certified to the administrator for issuance of an order.

Post Office Department

The Post Office Department has four trial examiners authorized. They handle principally Fraud-Order cases. During the past year, for internal or other reasons, there has been a marked reduction in the number of these cases. The Postmaster General is the agency. The practice is to issue initial decisions.

Treasury Department

Within the Treasury Department the Alcohol Tax Unit has three trial examiners and the Coast Guard has fourteen trial examiners. They are seperate agencies and dockets. The Alcohol Tax Unit is self-explanatory. Coast Guard cases concern negligence proceedings in the Admiralty and Maritime field, including enforcement proceedings. These cases involve merchant vessls, collisions and the conduct of masters and seamen. Such cases commence by orders—suspending or revoking required documents. Contested cases, which are numerous, are tried before hearing examiners. The existing system was largely re-organized and established in November of 1948 as a result of an intent to comply with the Administrative Procedure Act. The trial examiner issues a decision which is final except for right of review. The agency is the Commandant and the chief hearing examiner participates in the review procedure.

Department of Welfare and Education

This, the newest department, has two examiner positions on Food and Drug matters and eighteen examiners on Social Security Act cases. Presumably, the Secre-

tary is the agency. The Food and Drug cases may involve standards of identity and food quality and slack-full cases. Food and Drug and Cosmetics Act cases and, possibly, denials of applications involving new drugs and other miscellaneous matters, may be subject to examiner hearings. Most of the cases are in the nature of rule-making proceedings. The trial examiner merely certifies the record. The staff issues a tentative order on the record. Exceptions may be filed. The final order is issued in the name of the Secretary. The Social Security Act cases involve claims for lump sums or monthly benefit payments. These cases arise principally on disallowance of claims. The examiner's decision is essentially final, subject to review. There is an office of appeals counsel.

II. INDEPENDENT AGENCIES

Civil Service Commission

This agency has one trial examiner who handles Match Act cases. The examiner issues a recommended decision.

Federal Maritime Board

The Maritime Board is the regulatory agency of the Maritime Administration. The Chairman of the Board is the same person as the Maritime Administrator, who serves to minimize the differences between the Board, which is a regulatory agency, and the Administrator. It has five hearing examiners. Cases arise under the Shipping Act, Merchant Marine Act, and (subsidy cases) under Public Law 591. These are principally rate regulation cases. The remainder involve the chartering of vessels, under certain statutory conditions, and the allowance of subsidies, which have an aspect of competitor interest. There are also minimum wage cases. The Board is the agency and is independent with respect to regulatory matters. However, in subsidy cases, the Administrator or the Secretary of Commerce appears to be the agency. The examiner issues recommended decisions.

Securities Exchange Commission

This agency has four hearing examiner positions, two of which are active (the other two being "on loan"). Cases handled arise under the Securities Act, the Exchange Act, and the Public Utilities Act. The examiners issue recommended decisions. The Commission is the Agency. The submission of recommended decisions to the Commission is associated with a study prepared by an agency Opinion Division.

Subversive Activities Control Board

This agency has eight hearing examiner positions allotted. None are filled. The system is expected to be organized during August of 1953. This agency will handle cases under the Internal Security Act.

Veterans Education Appeals Board

This agency has three hearing examiners, one on loan from the Federal Trade Commission and two on loan from the Securities Exchange Commission. Cases involve rates of tuition as to World War II veterans and training allowances under Public Law 610. Examiners issue temporary decisions. The Board is the agency. The activity of this agency will rapidly diminish.

* * * *

The disposition by agencies of examiners' decisions is a matter most pertinent to the function and utility of examiners. As a sample, there is included below a statistical report on trial examiner output and "qualitative" results as to cases before the FCC and the FTC.

FEDERAL COMMUNICATIONS COMMISSION

Disposition of Initial Decisions Issued by Hearing Examiners During 1952

	Number of Initial Decisions	*Commission Action on Such Decisions*				
		Affirmed	*Affirmed in Part and Reversed in Part*	*Reversed*	*Dismissed*	*Pending*
Broadcast	33	16	1	1	1	14
Common Carrier	6	5				1
Misc.	4	3				1
TOTAL	43	24	1	1	1	16

FEDERAL TRADE COMMISSION

Disposition of Initial Decisions Issued by Hearing Examiners July 1, 1950 through December 31, 1952

Total number initial decisions			255
I. Initial Decisions containing Orders of Dismissal			35
Final without further Commission action		17	
Appeals taken		16	
Becoming final after appeal	2		
Reversed after appeal	1		
Remanded to Hearing Examiner after appeal	1		
Still pending	12		
	16		
Placed on Commission's docket for review		1	
Modified after review	1		
Pending (time not elapsed)		1	
		35	
II. Initial Decisions containing Orders to Cease and Desist and Orders of Dismissal			37
Becoming final without further Commission action		13	
Appeals taken		17	
Becoming final after appeal	3		
Modified after appeal	6		
Reversed after appeal	1		
Still pending	7		
	17		
Number reviewed by Commission		7	
		37	
Modified after review	3		
Still pending	4		
	7		
III. Initial Decisions containing Orders to Cease and Desist			183
Final without further Commission action		107	
Appeals taken		47	
Becoming final after appeal	9		
Modified after appeal	15		
Reversed after appeal	1		
Remanded to Hearing Examiner after appeal	3		
Still pending on appeal	19		
	47		
Number placed on Commission's docket for review		26	
Becoming final after review	2		
Modified after review	16		
Remanded to Hearing Examiner after review	3		
Still pending	5		
	26		
Number pending (time not elapsed)		3	
			183

From the rather limited information which your committee has been able to obtain, the most glaring fact is the wide variance among agencies in the matters of assigning, handling and reporting cases. They differ as to whether there is or is not a chief trial examiner, and whether he does or does not assign cases. There is the widest possible practice in the matter of examiner reports. In some cases, the trial examiner merely certifies the record to the agency for decision. In such cases, the

function performed has been likened to that of a glorified Notary Public. To the other extreme, in a considerable number of agencies, the examiner actually makes the initial decision. As a practical matter, in some agencies, this is tantamount to a final decision, subject to agency review. In a large number of agencies, the practice of submitting only recommended decisions still prevails. There are many variations on this procedure, including for example, the screening of recommended decisions by agency staff personnel who had no responsibility for the actual conduct of the hearings. To what extend the de facto situation as to these matters differs today from that which obtained prior to 1947, is difficult to state, and in some cases may be difficult to perceive. In several noteworthy instances, however, agencies have endeavored to comply with the letter and the spirit of the Administrative Procedure Act. There are recent indications of a slow trend in this direction.

There are some instances where trial examiners are used for proceedings other than cases of adjudication—such as rule making proceedings and other matters probably not subject to Section 5. In the overall, across-the-board situation, most agency cases are actually handled by trial examiners. Notwithstanding the uncertainties which have prevailed, there has evolved an increasing acceptance of the status and function of Hearing Examiners within the agency process. In actual fact, the large number of agency cases are disposed of at the trial examiner level.

The Committee thinks that one of the most serious blocks toward a better fulfillment of the purposes of the Administrative Procedure Act, is the failure of some of the agencies to authorize trial examiners to make initial decisions. Only by giving the trial examiner who presides at the hearing the responsibility of initially deciding the case, can the agency, the litigant and the Bar finally achieve fair, competent and impartial hearing procedures and reduce much undue delay and expense in agency hearings.

Donald C. Beelar, Chairman
Robert E. Freer, Vice-Chairman
Frank A. Constangy
Robert N. Denham
Payne Karr
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Daryal A. Myse
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Clifford R. Stearns

COMMITTEE ON FEDERAL TRIAL EXAMINERS

Report and Recommendations on S. 1708

For ease of comparison there is reproduced below Section 11 of the Act and the proposed amendment, S. 1708:

Section 11

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties in-

consistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

S. 1708

(a) The President shall appoint, by and with the advice and consent of the Senate, to and for each agency such number of qualified and competent examiners as may be required for proceedings pursuant to sections 7 and 8. Such appointments shall be made without reference to political affiliations and solely on the basis of character and fitness. Each examiner so appointed shall receive compensation at the rate of $14,000 per annum, shall hold office during good behavior, and may be removed only for neglect of duty, misconduct in office, or physical or mental disability. Removal of any examiner for any such cause may be accomplished only upon final order of the United States District Court for the District in which such trial examiner is stationed in a civil action for removal instituted by the agency in which such examiner is serving. No examiner shall be removed from office by reason of any reduction in force within any agency, any reorganization of or affecting any agency, or for any other reason (except for cause as herein provided) unless provision for such removal is made expressly by law hereafter enacted.

(b) Examiners appointed pursuant to this section shall perform no duties inconsistent with their duties and responsibilities as such. Such examiners are hereby declared to be administrative judges and subject in all respects to the canons and standards of conduct applicable to members of the Federal Judiciary. Within any agency, they shall be assigned matters and proceedings in rotation except to the extent that their unavailability may otherwise require. Upon a showing of need in each case, agencies may obtain the services of examiners temporarily assigned thereto at the direction of the President from other agencies on a reimbursable basis.

SEC. 2. Any hearing commenced before the date of enactment of this Act by any examiner appointed under section 11 of the Administrative Procedure Act shall be completed by such examiner, who for that pur-

pose shall serve as a temporary examiner. Any examiner heretofore appointed pursuant to such section may serve as a temporary examiner until he is replaced by an examiner appointed pursuant to such section as amended by this Act. No examiner while serving pursuant to this section as a temporary examiner shall receive increased compensation by reason of the enactment of this Act.

Your Committee, by a majority of its members, favors the enactment of S. 1708 and recommends that adoption of a resolution to that effect, for Section approval and submission to the House of Delegates for action at the 1953 annual meeting. (Other committee members have been encouraged to extend their separate views to this report).

DISCUSSION

The specific matter of choice is that of Presidential appointment of examiners or the government-employee selection procedures of the Civil Service Commission. In a broader sense the choice is: *Shall agencies control directly or indirectly, the appointment, tenure and compensation of Trial Examiners?* Is that not really the hard core of the issue? If this is the issue upon which differences may logically be stated, what is the area of agreement? What is the fundamental objective of the Act? It speaks of qualified and competent examiners. Certainly, hearing officers should be competent. Should they not, however, also be impartial? If so, between whom? Litigants only? Or between litigants and the agency. If he is to be competent and impartial, as these terms apply to agency cases, is that the total objective? What purpose is served if he has this quality and position but neither is utilized? Should not the presiding officer be *the* deciding officer—at least for the initial decision? If he is given no responsibility in the decision process then there is really nothing of substance to consider. If the area of fundamental agreement covers these three concepts (competent, impartial, decisive), then the issue relates essentially, not to the end, but to the means. Perhaps these postulates may be questioned, or better phrased, but there exists a commonly accepted objective. The issue is whether that objective is served or thwarted if the appointment, tenure and compensation of hearing officers is obtained by some means essentially dependent of control by interested agencies.

Of what importance is this question to the Act itself? Secsion 11, oddly enough, is the sole substantive provision of a statute on procedures. By this section, the examiners' position and status was established. This was essential to the operation of sections 5, 6, 7 and 8.

Before considering the provisions of S. 1708, it should be recalled that the Act, in the matter of agency cases, embraced two fundamental concepts. Procedures specified by the Act are *interagency* in scope and application and were stated to be minimum standards. (S. Rep. No. 111, 83rd Cong. Report on S. 18, p. 3, March 20, 1953):

> "The Administrative Procedure Act was intended to frame an outline of minimum essential rights and procedures applicable to every adminis-

trative agency of the Federal Government."

Secondly, the Act sought to assure equality between the litigant and the agency, and to assure impartiality, in the conduct of the hearing officer, in all case adjudication matters before the "bar" of that agency. Proof of this appears from various provisions of the Act requiring an internal separation of functions. Furthermore, Section 12 provides:

> ". . . all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons."

And Section 7(a), which specifies impartial conduct, expressly provides for removal of a hearing officer on the ground of personal *bias*.

Considering briefly the relevant circumstances which preceded passage of the Act, it will be further recalled that the Attorney General's Committee on Administrative Procedure recommended the establishment of an Office of Federal Administrative Procedure which, among other things, would appoint and remove hearing officers. The 1941 House of Delegates' resolution of the American Bar Association, (favoring S. 674), adopted a statement of principles on administrative adjudication to be reflected in any legislation. Significantly, two of the prinicples were: "provision for the independent selection of administrative hearing officers, . . . designed to secure their independence of judgment," and "provision that decisions shall be made by the administrative officer who heard the case in the first instance (subject to review by superior administrative officers) . . ." 66 A.B.A. Rep. 402.

The Attorney General's report stated:

> "it [the committee] recognized that examiners, or hearing officers, are a necessity. As a matter of fact, they are referred to as *'the heart of formal administradtive adjudication'* * * * * * * the recommendations of the Committee, these hearing commissioners would constitute a separate unit in each agency organization. They would have the same relationship to the agency as judges of lower courts have to appellate judges who review their decisions."

So much for legislative background. The bill enacted, of course, failed to adopt the above recommendation; instead, it adopted the compromise of allowing appointments through the established Civil Service Commission procedures.

We pass over the intervening six years. Looking now to S. 1708—its passage would end the Civil Service Commission experiment in the matter of trial examiners, and would render the *Ramspeck Case* dead letter law on a repealed statute.

Turning to S. 1708, we are studying the reconsideration by Congress of the trial examiner situation. The Association's resolution of March 17, 1941 should not foreclose our re-appraisal of the same problem in 1953. For this record, embodying the statement of fundamental principles, is too relevant to be disregarded. It is signficant that S. 1708 and the Association's 1941 proposals have one thing in common: provision for the appointment, tenure and removal of

hearing examiners, *independent* of the agencies.

Significant Provisions

Presidential Appointment. The bill would take advantage of the time-proven appointment procedure applicable to Federal judges. The experience and tradition of the Senate Judiciary Committee would be availed of in the selection of trial examiners. Under all situations, this is to be regarded as appropriate and wholesome. In operation, established custom would allow the agency substantial consideration in the nomination procedure. Interested organizations of the Bar would be given opportunity to make recommendations. This process would contribute to desired stability and public confidence in the administrative process.

Removal. Removal would be upon agency complaint before the United States District Court for specified causes.

Removal other than by complaint would be possible only if authorized by express provision of a subsequent law. Thus, were an agency abolished or reorganized or to have its appropriations reduced, a specific provision of law stating its application to the trial examiners (administrative judges) of that agency, would be required for removal of the examiners.

Assignment of Cases. All cases of the particular "agency" would be assigned in rotation, except for unavailabiilty.

Judicial Ethics. Examiners would be named "administrative judges" and would be subject to the canons and standards applicable to Federal judges.

CRITICISMS AND COMMENTS

It is believed that this legislation would be improved were it amended or modified to meet some or all of the following criticisms:

(1) Removal of an officer in the Executive Branch by proceedings in a constitutional court would be cumbersome and would perhaps entail some constitutional question. In any event, it would seem more appropriate were the removal power vested in the United States Court of Claims. (A special procedure should be outlined for the prompt determination of such cases before the court en banc).

(2) Express provision should be made in the bill as to the age of retirement and for retirement pay.

(3) The bill should expressly require that the "administrative judges" shall issue initial decisions in every case assigned for hearing. The concept of "administrative judges" is totally inconsistent with the prevailing liberality of agency discretion in reporting cases allowed by Section 8(a) of the Act. It would be unacceptable to preclude administrative judges from responsibility for the initial decision of an agency case.

(4) It would seem advisable that provision be made in the bill for incumbent examiners who are not appointed and confirmed as administrative judges. It would seem appropriate that express provision be made, in the bill, for the ingrade transfer of all incumbents not appointed within six months from date of enactment, to non-hearing examiner positions within the agency. In making the initial appointment

under the bill, it is believed that weight should be give to those incumbents who have had satisfactory experience and have demonstrated competence in existing assignments.

(5) Given a system of administrative judges as provided by the bill, the problem of case rotation becomes less important. It would seem desirable to provide for the assignment of cases, designated by the agency for hearing, by a chief or senior "administrative judge" of that agency. Provision might also be made for agencies to establish two or more separate dockets of cases, in accordance with rules and regulations established by that agency.

(6) Some further study should be given to the problem of reduction in force. For example, the President has certain reorganization powers which may become effective without affirmative legislation. The status of administrative judges involved may be rendered doubtful unless any such reorganization were to include a separate and specific provision for the reassignment or disposition or the administrative judges of any affected agency. It would seem that the provision relating to reductions in force should be subjected to more detailed consideration.

(7) The bill carries forward from section 11 a glaring omission as to the number of examiners required in any particular agency. This bill should also contain some expression of legislative policy or statutory standard as to what tolerance is allowable on case delays. To date there has been no correlation between numbers of examiners or reductions in force with docket backlog.

It is realized that the concept of Presidential appointment and specified salary may be considered incompatible with certain classes of cases in a few agencies. It is not believed that such individual situations, relatively few in number, should be given undue influence in terms of the broader objective. Any bill which is interagency in scope is bound to have a different impact in particular situations. If there is concern with regard to any particular agency, as to this matter, it would seem more appropriate that the problem be handled by special legislation. In this connection, it might be advisable to specify, by inclusion and exclusion, the proceedings of all the agencies which are or are not, "cases of adjudication" as used in section 5 of the Administrative Procedure Act. Establishment of a system of "administrative judges" might well be associated with an agency-by-agency, statute-by-statute reappraisal of matters presently intended to be embraced as cases of adjudication. In nay event, the problem is one which should be resolved finally and agreeably to all interests at the earliest possible date.

Without qualifying the above endorsement of S. 1708, the Committee does not mean to foreclose consideration of any other method of appointment which is organizationally sound and practical of acceptance. The 1941 proposal for an Office of Federal Administrative Procedure was organizationally defective. This might be cured by modifying the proposal to comprise a governing board of three, i.e. a Chairman appointed by the President, with

consent of the Senate, and two retired Federal Judges, with a director and small staff. Such Office, as one of its principal duties, would appoint, reassign and remove Federal Trial Examiners. It would also provide a focal point for general superintendence of the Act and its administration.

DONALD C. BEELAR, Chairman
For a Majority of the Committee

I concur entirely with the criticisms, comments, and recommendations of the majority as set forth in the advance print of the Committee Report on Federal Trial Examiners, except with respect to Item (4) thereof in connection with which I respectfully submit the following dissent:

Item (4) of the "Criticisms and Comments" of the Committee Report on Federal Trial Examiners recommends modifying S. 1708 to provide for transfer of incumbent trial examiners who fail to secure Presidential appointment after the bill's enactment to non-hearing examiner positions within their respective agencies.

I strongly oppose the adoption of such a provision. The fundamental object of S. 1708 is to assure the creation of a body of trial examiners who are characterized not only by technical and professional skills and competence but who possess the objectivity, freedom from bias, and fairness which are prerequisites to the proper performance of the adjudicating function. S. 1708 presumably was introduced because its sponsors are not convinced that the incumbent federal trial examiners possess these essential judicial attributes.

However, the administration of federal regulatory legislation which involves litigation between the government and members of the public similarly requires that governmental officials who perform the duties of investigation, prosecution and appeal, similarly be free from any bias which impairs their ability to treat the public fairly. Testimony before many Congressional Committees strongly indicates that abuses in these areas can have results as unfortunate as those resulting from abuse in performing judicial functions.

Hence, it follows there should be no automatic guaranty of job security for incumbent trial examiners who, at least in part, fail to qualify for appointment under S. 1708 because of lack of objectivity and impartiality. Such individuals should compete on the basis of their qualifications for available vacancies in the executive agencies involved. I am sure that their experience as trial examiners will carry substantial weight in assessing their qualifications for other positions and that their competitive position will not be adversely affected as compared to other applicants.

In any event, it seems a dubious practice to create special and favored categories of federal employees, based merely on the fact that the members of such groups had previously been federal employees. All applicants for federal positions should stand on an equal competitive footing in which education, experience and personal characteristics should be given their proper weight with no advantage automatically going to any individual or category.

/s/ Michael J. Bernstein
Michael J. Bernstein

REPORT OF THE IMMIGRATION COMMITTEE

The Immigration Committee was inactive this year. No matters were brought before it or referred to it and there appeared to be no occasion for a meeting.

There has been very little opportunity as yet to test the impact of the new Walter-McCarran Act. The President has suggested a few changes in that Act. A group under the auspices of Senator Lehman is engaged in an ambitious restatement of the entire immigration and nationality law. This bill has not yet been introduced. As and when these bills are introduced and referred to committee our Immigration Committee may find it appropriate to meet and discuss them. H.R. 337 relating to the admission of 300,000 non-quota immigrants was referred to Mr. Wasserman and myself for study. This bill relates primarily to substantive problems of immigration policy and does not seem to involve any general procedural questions with which the Administrative Law Section would be concerned.

/s/ Louis L. Jaffe
Louis L. Jaffe, Chairman

REPORT OF THE COMMITTEE ON IMPROVEMENT OF ADMINISTRATIVE PRCEDURES

June 12, 1953

The Committee is now in its second year and has carried on through subcommittees the same activities as formed the subject of its 1952 report, except that the Subcommittee on the Finality Clause in Government Contracts has become a separate committee of the Section. Additional matters which have been referred to the Committee have received preliminary attention, as reported below.

Good Faith Reliance Act

The work of the Subcommittee on Binding Administrative Rulings has resulted in the draft of a bill which has been introduced by Senator Langer and has become S. 1752, 83rd Congress, "To establish good faith as a defense in certain cases." A copy of S. 1752 is attached. An earlier draft of the Subcommittee's proposal is explained in an article by Mr. Newman, chairman of the Subcommittee, entitled "Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law," 53 Colum. L. Rev. 374 (March, 1953). Pending its further consideration, the bill is subject to the suggestions of interested persons. The Subcommittee itself expects to have some to make. The proposal, however, seems ripe for approval by the section, subject to further technical revisions. These may be specified in the discussion of this subject which is to take place at the 1953 Annual Meeting. The Committee therefore recommends the adoption of the following resolution by the Section:

> The Section of Administrative Law approves the proposal embodied in the bill, S. 1752, To establish good faith as a defense in certain cases, now pending in the 83rd Congress, subject to possible technical revisions better to effectuate the intent of the proposal,

and authorizes the Council to recommend approval by the House of Delegates at an appropriate time.

It is expected that the Mid-Winter meeting of the House of Delegates may offer an appropriate occasion for consideration by the House.

Uniformity of Rules of Procedure

A subcommittee of the Senate Committee on the Judiciary held hearings on March 12, 1953 with regard to S. 17, To provide general rules of practice and procedure before Federal Agencies. Pursuant to the action of the Section in approving the 1952 report of this Committee, embodying a report of the Subcommittee on Uniformity of Rules of Procedure. The Chairman of the Section and Chairman of the National Committee testified in the hearing, to report the Section's action. Mr. Charles H. Kinnane has become chairman of the Section's subcommittee.

President's Conference on Administrative Procedure

The Council has assigned to this Committee primary responsibility for formulating suggestions to be made through the Council and other appropriate Association channels to the Conference of Administrative Agencies, which has been summoned by President Eisenhower, if such suggestions should be desired. These suggestions would relate, not to the merits of the matters involved, but to subjects which might helpfully receive the attention of the Conference. Mr. Robert L. Stern, Acting Solicitor General of the United States and a member of this Committee, was among the officials whom the Attorney General designated to plan for the first meeting of the Conference. Through Mr. Stern the Council was able to make informal suggestions which emanated in part from members of this Committee. Probably any needs have been met by this means; but the Committee is endeavoring to formulate a list of specific suggestions, to be used if called for.

Administrative Court Proposals

The Subcommittee on a Nisi Prius Administrative Court, with the same personnel as in 1952, is continuing its consideration of a possible measure to establish a special court or courts to adjudicate matters now subject to initial adjudication by administrative agencies. A previous proposal to establish an administrative court of general jurisdiction to review agency action, which formed the subject of a report by a special Section committee in 1951, has been embodied in S. 14 in the 83rd Congress, introduced by Senator McCarran and referred to the Committee on the Judiciary. The Council has referred this bill to your Committee. A subcommittee will be established to keep in touch with the proposal.

Pre-trial Procedure in Administrative Proceedings

The subcommittee on Pre-trial Procedure in Administrative Proceedings, again with the same personnel, has continued its study of this subject. A discussion of the use of pre-hearing conferences by administrative agencies took place at the Richmond regional meeting on May 5. A demonstration of a sample pre-hearing conference involv-

ing hypothetical television applications before the Federal Communications Commission, will take place at a general session of the Section's 1953 Annual Meeting.

Appointment and Removal of Hearing Examiners

Senator McCarran has introduced S. 1708 in the present Congress, To amend Section 11 of the Administrative Procedure Act. The amendment would provide for the appointment of hearing examiners by the President with the advice and consent of the Senate, require an order of the United States District Court for the removal of an examiner, and require that proceedings within an agency shall be assigned to examiners in rotation except as to their unavailabiilty may otherwise require. Three Committees of the Section are concerned with this measure, which will be discussed at the Boston meeting. Your Committee is endeavoring to formulate its tentative views.

Codification of Agency Rules

Senator Langer has introduced S. 1185 in the present Congress, which would authorize the Administrative Committee of the Federal Register, with the approval of the President, to require from time to time the preparation and publication of codifications of the documents of each agency which have general applicability and legal effect and which have been published in the Federal Register. This bill has been referred to your Committee and will receive its attention.

Ralph F. Fuchs, Chairman

83d Congress 1st Session

S. 1752

IN THE SENATE OF THE UNITED STATES

April 24 (legislative day, April 6), 1953
Mr. Langer introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To establish good faith as a defense in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be liable to the United States Government for damages or penalties because of conduct not in conformity with any statute or other law, if he establishes that his conduct was in conformity with and in good faith reliance on a rule, order, opinion, or other written statement of an agency responsible for administering that law, and if such statement was promulgated to guide him or the class of persons to which he belonged. The statement similarly shall absolve him from liability to a third person for all damages other than actual damages. It shall absolve him from liability to a third person for actual damages only if he also establishes (A) that his conduct occurred after the third person had notice of his intent to rely on the statement, and (B) that the third person could reasonably have been expected to seek administrative or judicial review of the statement. If the statement relied on was later superseded, revoked, or invalidated, or modified

so that his conduct was no longer in conformity with it, a person is excused for the period prior to the time he knew or should have known of the change, and also for the period reasonably required for him to comply with the change.

Sec. 2. Consistently with the purposes of this Act, agencies may by rule identify the classes of officials who are authorized to issue written statements that may be relied on.

Sec. 3. This Act is not intended by implication to prevent the application of a doctrine of estoppel in appropriate cases. It may be cited as the "Good Faith Reliance Act".

REPORT OF COMMITTEE ON LABOR

The Labor Committee's activities for the year 1952-1953 were confined to a study and report on S. 659, 83rd Congress, First Session, introduced by Senator Taft of Ohio. The bill would effectuate a complete severance of the investigatory and prosecuting functions of the National Labor Relations Board from its judicial functions. A copy of the Committee's Report, favoring in principle S. 659, is attached hereto.

The following resolution is submitted for favorable consideration by the Section and the American Bar Association as a whole:

> RESOLVED, That the American Bar Association supports in principle S. 659, 83rd Congress, First Session, a bill introduced by Senator Taft of Ohio, which would effectuate a complete severance of the investigatory and prosecuting functions of the National Labor Relations Board from its judicial functions, and
>
> FURTHER RESOLVED, That copies of this resolution be sent to the Chairmen of the respective Senate and House Committees having jurisdiction of S. 659.

INTRODUCTION

S. 659, a bill to amend the Labor Management Relations Act, 1947, (commonly known as the Taft-Hartley Act) was introduced by Senator Taft on January 26, 1953, and was considered along with other bills and other proposed amendments to the Act by the Senate Committee on Labor and Public Welfare at hearings held between March 24 and April 30, 1953.

The primary purpose of the bill is to effectuate a complete severance of the investigatory and prosecuting functions of the National Labor Relations Board from its judicial functions. The Taft-Hartley Act itself took a long step in this direction through its establishment of an office of General Counsel within the Board to handle the Board's investigatory and prosecuting functions. S. 659 goes further in that it creates a completely independent office of Administrator of the National Labor Relations Act to take over the functions of the General Counsel and also to perform additional duties.

DETAILED ANALYSIS OF BILL

The major changes in the present law, which S. 659 makes, are the following:

1. The number of Board members is increased from five to seven, and their term

of office is lengthened from five to seven years. Not more than four board members are permitted to be of the same political party.

2. The present office of General Counsel of the Board is abolished.

3. The Board is deprived of authority to appoint examiners and regional directors.

4. The bill authorizes the Board to use attorneys to make application to the courts for enforcement of Board orders. This contrasts with the present law, which empowers the Board to use attorneys to "appear for and represent the Board in any case in court."

5. An office of Administrator of the National Labor Relations Act is set up as an independent agency. The Administrator is to be appointed by the President, by and with the consent of the Senate, "with reference to his fitness to perform the functions imposed upon him by this Act in a fair and impartial manner," and is to receive a salary of $15,000 a year. He must be a member of the bar and his term of office is fixed at four years. He may appoint attorneys to appear before the Board or in court to represent him. In this connection it is specifically provided that the Administrator may appeal orders of the Board to the courts. The Administrator is also authorized to establish and staff regional offices. A Deputy Administrator, likewise to be appointed by the President and confirmed by the Senate, is also provided for. He is to serve a term of four years, be a member of the bar and receive an annual salary of $12,000. The duties conferred upon the Administrator include the investigation of unfair labor practice charges, the issuance of complaints, the prosecution of such complaints before the Board and the courts, the investigation of representation petitions and the conduct of representation elections. All of these duties, except those of prosecuting complaints before the courts, the investigation of representation petitions and the conduct of elections, are vested by the present Act in the General Counsel. The bill continues in the Board the power to *hold* representation hearings and to *direct* elections.

6. The Administrator, like the Board, is authorized to make rules and regulations necessary to carry out the Act, in the manner prescribed by the Administrative Procedure Act.

7. The Administrator is authorized to conduct decertification elections and to certify the results.

8. Non-Communist affidavits required of union officials are to be filed with the Administrator instead of with the Board.

9. Any person, against whom a complaint is issued, may obtain a determination by the Board of the question whether the alleged unfair labor practice affects commerce, by filing a motion to dismiss. The filing of such motion operates to postpone the hearing on the complaint.

10. The discretionary power to seek injunctions against unfair labor practices under Section 10 (j) of the Act is transferred from the Board to the Administrator.

11. Applications to the courts for the enforcement of subpoenas are to be made by the Administrator.

12. Officers and employees of the Board, now performing functions which are transferred to the Administrator, are transferred to the office of Administrator.

RECOMMENDATIONS

A. *Overall Purpose of the Bill*

The members of the Labor Committee of the Administrative Law Section have been canvassed as to their views on S. 659, and while definite agreement has not been reached on all particulars, the Committee does unanimously approve the objective of the bill to effect a complete separation of the investigatory and prosecuting functions under the Taft-Hartley Act from the judicial functions. The Committee feels, however, that in line with this purpose, the power to seek enforcement of Board orders in the courts should be placed in the Administrator and not the Board. One committee member, however, is of the opinion that if the Board is allowed to seek enforcement of its orders in the courts, the Administrator should be permitted to intervene to express his views if they differ from those of the Board. The other committee members have expressed no opinion on this subject.

One committee member objected to the creation of a separate agency to handle the investigatory and prosecuting functions. He pointed out that with two different policy-making agencies administering the same statute, there would be danger of conflict and disagreement, which in turn would create widespread dissatisfaction with the law's administration. He referred specifically to the provision allowing the Administrator to appeal to the courts from a Board order. This, he said, presented the anomaly of two agencies of the government administering the same law and opposing each other in court proceedings. He suggested, therefore, that the present General Counsel set-up be retained and that the additional powers, which S. 659 would give the Administrator, be conferred upon the General Counsel.

The other committee members, however, are of the opinion that if the Board is given only adjudicatory functions and another agency is given the prosecuting functions, the effect will be to create a much more wholesome atmosphere conducive to fair and impartial administration of the law. They deem this the paramount consideration and hence subscribe to the principle of the bill of establishing a separate, independent agency to perform the investigatory and prosecuting functions.

As for the criticism that it is anomalous to have two different government agencies, each administering the same law, and yet opposing each other in court, it is doubtful that such situation will arise under S. 659. In cases where the Administrator appeals from a Board order, the opposing party will be the employer or union involved and not the Board. And as already indicated it is believed that the Board should not be empowered even to seek enforcement of its orders in the courts, but that such power too should be placed in the Administrator. The Board would thus perform exclusively judicial functions.

One committee member also suggested that S. 659 be amended to provide that where a court of appeals has adjudicated a particular point of law arising under the Act, the Board should be required to abide by such adjudication in its future decisions. The other committee members have expressed no views on this matter.

B. *Changes in Composition of Board*

Most of the committee members favor the increase in the membership of the Board from five to seven. It is felt that the increase in Board membership will create greater efficiency, more expeditious case handling and a larger output by the Board. These are extremely desirable results. The hearings at this session of Congress before the House and Senate Labor Committees show that both management and labor groups are perhaps more concerned with the slowness of the Board's procedures than with any specific provision of the Act itself.

One committee member, however, objected to the increase in Board membership, pointing out that that would tend to create panels of the Board which would decide most of the cases. One answer to such criticism is that except in cases involving new policy questions, most decisions of the Board are presently rendered by panels anyhow.

The provision of the bill that not more than four members of the Board shall be members of the same political party is similar to like provisions in present law pertaining to other agencies, e.g., the Federal Trade Commission, the Federal Power Commission, the Federal Communications Commission, and the Interstate Commerce Commission. The committee unanimously endorses this provision.

C. *Miscellaneous Other Features*

1. The committee unanimously favors the provision of the bill, under which a person, against whom an unfair labor practice complaint is issued, can first secure a determination of the commerce issue before having to litigate the merits of the complaint. Thus, if the Board decides that commerce is not affected, that will dispose of the entire case and the parties, including the Administrator, as well as the Board, will not be put to the expense and time of going through the useless procedure of litigating the merits of the case.

2. The committee suggests that those provisions of the bill authorizing expenditures by the Board and the Administrator be circumscribed by the requirement that the expenditures be "proper and necessary" and "necessarily" incurred. The committee further suggests in this connection, in the interest of saving expense, that wherever possible, the Board and Administrator be required to use local reporters to make stenographic transcripts of hearings.

3. One committee member suggested that instead of a term of four years for both the Administrator and the Deputy Administrator, the term of the Administrator be fixed at six years and that of the Deputy at three or four years. Thus, there would be a continuity of authority with respect to matters entrusted to the Administrator, should there be a change in either the Administrator or Deputy.

Milton C. Denbo, *Chairman*

REPORT OF THE COMMITTEE ON ORGANIZATION AND BY-LAWS OF THE ADMINISTRATIVE LAW SECTION

At its annual meeting on September 16, 1952, the Section of Administrative Law adopted the following amendments to its By-laws, such amendments to be retroactive to September 16, 1952.

Amendment to Article II, Section 1 of the By-laws.

> Section 1. Each member of the Section shall pay to the American Bar Association annual dues of five dollars. Any member of the Association, upon request to the Secretary of the Association and upon payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

Amendment to Article III, Section 3.

> Section 3. The Chairman, Vice-Chairman and Secretary shall be nominated and elected in the manner hereafter provided, and shall hold office for a term of two years thereafter, and until their successors shall have been elected and qualified: Provided, That, the Chairman, Vice-Chairman, and Secretary nominated and elected at the annual meeting at which this amendment to the By-laws of the Section of Administrative Law shall be adopted shall hold office for the term of two years specified in this amendment, in the event such amendment becomes effective upon approval of the Houe of Delegates in accordance with Article IX of these By-laws.

Amendment to Article IV.

> Section 1. *Nominations.* At the first session of the annual meeting the Chairman shall appoint a Nominating Committee of three members of the Section not members of Council, which Committee shall make and report nominations to the Section each even-numbered year for the offices of Chairman, Vice-Chairman, Secretary and Section Delegate and each year for members of Council, to succeed those whose terms will expire at the close of the then annual meeting and to fill vacancies then existing for unexpired terms except in the case of the Section Delegate whose selection is made by Council in accordance with Article VI, Section 3 of these By-laws. Other nominations for the same officers may be made from the floor.

Amendment to Article VI.

> Section 3. If a vacancy occurs in any office after the person has been duly elected and qualified, the Council may fill such vacancy and the person so selected to serve until the next annual meeting except in the case of the Section Delegate who shall serve for the remainder of the term.

The amendments were approved by the Board of Governors on February 23, 1953.

Inadvertently a typographical error was not corrected prior to presentation to the Board of Governors; and in the copy certified by the American Bar Association the amendment to Article VI, Section 3 appears as an amendment to Article IV, Sec-

tion 3. Article VI, Section 3 appears as it was before amendment. It is the opinion of the Committee that further action by the Section is not necessary to correct the error; and that attention should be called to the appropriate office of the American Bar Association.

In the certified copy of the By-laws, there appears a Proviso to Article III, Section 6 and therein it is noted that this clause appears in the original By-laws as a part of Article III, Section 4. The minutes of the organizational meeting of July 1, 1946, do not reflect that such a Proviso was a part of the By-laws adopted; and, the original By-laws, as published in Volume I, Number 1, of the Bulletin, January 10, 1949, did not contain the Proviso. (If it was adopted, it appears it should follow Section 4 rather than Section 6.) It is recommended that this be brought to the attention of the appropriate office of the Association.

Louisa Wilson,
Chairman

REPORT OF SECTION DEVELOPMENT COMMITTEE

This Committee has been charged by the Chairman and Council with two duties:

(1) To increase the membership of the Section; and

(2) To make recommendations as to how the program of the Section can be made more useful and attractive to the profession.

The Committee reports as follows:

1. *Membership*

Membership has been from 1044 as of October 15, 1952 to approximately 1100 as of June 15, 1953. A continuing drive for new members is being made, and the Committee expects to report some further increase in membership at the August Section meeting in Boston.

2. *Suggestions for the Program of the Section*

The Committee has solicited and received from several members of the Section suggestions with respect to the program of the Section, which are here summarized for consideration by the membership and the Council:

(a) That the Section adopt an aggressive program and statement of principles, based upon the improvement of the processes and procedures covered by the Administrative Procedure Act.

(b) That members be given more information on the techniques of presenting factual evidence in administrative cases.

(c) That Section members who cannot attend annual meetings be given greater opportunity to participate in the affairs of the Section.

(d) That the Section *Bulletin* be published more often, and contain more data, particularly state court decisions.

3. *Acknowledgments*

The assistance of the following in connection with the work of the Committee is gratefully acknowledged: Mr. Cecil Beasley, Washington, D. C.; Mr. John H. Benckenstein, Beaumont, Texas; Mr. James C.

Dezendorf, Portland, Oregon; Mr. Donald R. Heggy, New York City; Mr. Sumner S. Kittelle, New York City; Mr. Robert F. Leach, St. Paul, Minnesota; and Mr. Alfred L. McCarthy, Miami, Florida.

Respectfully submitted,
Harold L. Russell,
Chairman

Editor's Note: There is appended to the report of the Committee on Section Development the following letter to the chairman of the committee, dated June 12, 1953, from section-member Donald R. Heggy, for its interest to the membership at large.

Dear Mr. Russell:

Apology is made for my failure to reply to your letter of March 25. When I delayed an acknowledgment originally it was my thought that I could return some applications for membership. Unfortunately, after all these weeks, this is not the case.

My difficulty seems to be an inability to sell a "bill of goods". The prospects press for a sales talk. They want to know what the section has done since A.P.A. They want to know what they will "get" out of membership in the section.

Frankly, when pushed for a "sales talk" along those lines by attorneys who did not have enough interest to join the section at a time when A.P.A. was forcibly before them—when it was so new and untried—one must be a "good" salesman. We should be the fastest growing section in the Association! For some reason, we have never gotten off of the ground! I don't know what the membership is in our section, but I'll wager that we have less today than we had within six months after the section was established. If not that bad, have we secured our proportionate share of *new* members of the Association?

So you ask, and I feel that it is pertinent, how can the activities be made more valuable to the Bar. My "shot-gun" answer is that we adopt as our primary goal the objective of improving the processes and procedures covered by the A.P.A. If that is our objective, then I suggest that we follow-through and actually do something about it.

If we had been doing the job, it would not have been necessary to wait for the Judicial Conference of the United States to take action looking toward improvements in the administrative field. The conference has succeeded in having the President appoint a committee. The fact that one member of the section—our former chairman Vice Chancellor Charles Nutting of Pittsburgh Law—was appointed a member of the committee was no accident; but it did not result from the activities of our section.

As a matter of fact, on the most important project since the A.P.A., the Judicial Conference did not even ask for the views of the section! We learned about the proposed report of a subcommittee of the Judicial Conference. We requested an opportunity to be heard. We asked for representation when the subcommittee had tentatively concluded that the President's committee should be composed only of representatives of the agencies.

I submit that it may be said that we failed to follow-through after A.P.A. Evidence of that is the fact that we only caught on the coat-tails of a program to

improve *administrative* proceedings instead of leading the parade which had to be instituted by the *judiciary*.

So now, at least, we have commended the Judicial Conference for recommending action. (We adopted a resolution to this end in Sept. 1951.) We have a foot in the door. The next thing is to really cooperate and to work toward improving the processes. Unfortunately, I'm afraid that many members of the Association and some members of our section do not believe that the "process" can stand any "improvements"—or shall I say any changes that will eliminate "unnecessary delay, expense, and volume of records" to which the Judicial Conference made reference in its recommendations to the President.

Recently the Rockefeller interests created an organization charged with the job of looking into possible improvements in government. That covers a wide field. It will surely touch upon matters in which we must be interested. I mention that as suggesting that people are demanding changes in a field in which we in the Administrative Law Section, and the Bar generally, must be interested. We should be doing something constructive to point the right direction—to "chart the course".

I suggest that the section agree upon a well-rounded program and a statement of principles at its annual meeting in 1953. With that as a basis, we may be able to whip up some interest in and out of the Association. At least, we may be able to impress the world that we are *interested* in improving the administrative process, even if we have been ineffective.

You will pardon me, I hope, for taking the liberty of sending a copy of this letter to several members of the section. I suggest to them (and at this point I am making such suggestion) that they write you their ideals of implementing the "well-rounded program" or of some other way of creating interest in the section.

What ever we do, let's improve the communication between members. May I also suggest that members who cannot attend the annual meeting should have an opportunity for more personal and direct participation in the affairs of the section.

Sincerely yours,
Donald R. Heggy

REPORT OF COMMITTEE ON STATE ADMINISTRATIVE LAW

The Committee on State Administrative Law this year undertook a factual study, which has not yet been completed, concerning the question: In state administrative tribunals, do the duly authorized officers charged with responsibility for decision-making, actually "master" the records of the cases they decide; or do they in effect delegate to staff assistants the task of evaluating conflicting testimony and determining the proper application of the statute in run-of-the-mine cases?

The question was suggested because in the 1952 survey the Committee members expressed themselves by a vote of 20 to 2 as favoring the enactment of legislation similar to the provisions of Section 10 of the Model State Administrative Procedure Act (providing that whenever in a contested case a majority of the officials who

are to render the final decision have not heard or read the evidence, no decision adverse to respondent may be made until a proposed decision, including findings and conclusions, has been served on the affected parties, and an opportunity given them to argue thereon before a majority of the officials who are to render the decision, and who shall personally consider such portions of the record as may be cited by the parties).

In carrying out the survey, state representatives were asked to make reports respecting five agencies which are found in almost every state.

On the basis of incomplete returns so far received, the following tentative observations may be made:

In the case of the state public utilities commissions, testimony is normally taken before the commissioners themselves, at least in important cases. This was found to be the case in eight out of ten states. However, it also appeared that frequently, in cases deemed routine or unimportant, the public utilities commissions delegate to staff employees the power to hear testimony and recommend decision; and in such cases, it is thought, there occurs something closely approaching delegation of actual decision-making power to the staff assistants.

In the case of state tax agencies, nine of the ten states reported that ordinarily members of the state agency personally hear the testimony.

In the case of agencies handling numerically larger case loads, such as workmen's compensation commissions and unemployment compensation commissions, the data so far received indicates that quite frequently such agencies employ staff assistants to take testimony, and that agency members are strongly inclined to accept the recommendations of such hearing officers without independent study of the record and sometimes without even allowing oral argument before the agency.

In the case of the corporation and securities commissions, no fixed trend or pattern emerged from the incomplete data so far obtained. The answers show only that there exists a wide variety of practices in the several states, going from the extreme where the commissioners personally hear the evidence in every case, to the other extreme where the commissioners decide cases on the basis of reports prepared by assistants without granting counsel any opportunity to argue thereon before the officials charged with statutory responsibility for decision.

The reports received to date indicate that in a substantial number of instances agency members do decide cases without being adequately informed of the factual details; but no general conclusions, nor specific criticisms, may justifiably be formulated on the data so far compiled.

The problem varies in many respects from one state to another, and as between the several agencies in a single state.

This persuasively indicates (as pointed out in last year's report) that the best solution to the problem is along the lines of the Model State Act, giving each agency adequate opportunity to work out its own decision-making procedures, but requiring

that if the agency members find it impractical to hear the testimony, or to read the full transcripts in every case, they shall serve a proposed decision upon all affected parties, advising the parties in detail of the findings and conclusions which the Commission proposed to make, giving the parties and opportunity to argue on such proposed findings and conclusions before the commissioners themselves, and requiring theh commissioners personally to consider such portions of the record as may be cited by the parties in connection with such oral argument.

Frank E. Cooper,
Chairman

REPORT OF THE COMMITTEE ON TRANSPORTATION

Four bills have been referred to this Committee during the current year for comment and recommendation. They are:

S. 905 which is a Bill to authorize the Interstate Commerce Commission to revoke or amend, under certain conditions, water carrier certificates and permits, introduced February 13, 1953, by Senator Johnson of Colorado.

S. 1501 which is a Bill to authorize the Interstate Commerce Commission to revoke, amend or suspend, under certain conditions, water carrier certificates and permits, introduced March 30, 1953, by Senator Tobey.

H.R. 287 which is a Bill to provide for the separation of subsidy from air mail pay in accordance with recommendations of the Commission on Organization of the Executive Branch of the Government, introduced on January 3, 1953, by Representative Hoffman.

H.R. 2970 which is a Bill to amend the Interstate Commerce Act in order to expedite and facilitate the termination of railroad reorganization proceedings under Section 77 of the Bankruptcy Act and to require the Interstate Commerce Commission to consider, in stock modification plans, the assents of controlled or controlling stockholders, and for other purposes, introduced February 12, 1953, by Representative O'Hara.

These Bills will be discussed in the order listed above. S. 905 and S. 1501 will be discussed together since their substance is practically the same.

S. 905 *and S.* 1501. The only difference between these two Bills is that S. 905 amends Section 309 of the Interstate Commerce Act (49 USC Section 909) by adding at the end thereof a new subsection (h); whereas S. 1501 adds a new section in Part III of the Interstate Commerce Act designated Section 312(a). Subsection (h) in S. 905 and Section 312(a) in S. 1501 are identical except for the references to the particular section or subsection involved. For convenience, and in order to convey the purpose of the Bills, we shall quote in full the amendment provided in S. 905:

> "(h) Certificates and permits shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate or permit may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in

whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of Part III of the Interstate Commerce Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate or permit, or for willful failure to engage in, or to continue to engage in, the operation authorized by such certificate or permit. The right to engage in transportation in interstate or foreign commerce by virtue of any certificate or permit, or any application filed pursuant to the provisions of subsection (a) of this section, or temporary authority under section 311(a), may be suspended by the Commission upon reasonable notice of not less than fifteen days to the carrier, but without hearing, for failure to comply, and until compliance, with the provisions of section 306(a) or 306(e) or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

This provision is intended to provide a method for amending or revoking the certificates of water carriers and for suspending, changing or revoking such certificates in whole or in part for failure to comply with any provision of Part III of the Interstate Commerce Act. In this respect the Bills seek to provide a procedure for amending or revoking certificates of water carriers such as that provided for motor carrier certificates in Section 212 of Part II of the Act. As will later appear, however, the procedure provided in S. 905 and S. 1501 is different from that provided in Section 212 relating to motor carriers and contains an objectionable feature not present in Section 212.

Before going into this matter, however, a brief comment is in order as to our conception of the function of our Committee. We assume that one of the primary purposes of the Administrative Law Section is to be on the alert for proposals which tend to obstruct the effectuation of the purposes of the Act. We do not think that it is our function to pass judgment on the substantive merits of particular legislation or on the policy considerations which lie behind the introduction of such measures. However, we do not conceive our function to be limited strictly to matters concerning the Administrative Procedure Act, but rather to all procedural proposals or modifications which offend the spirit of fair play in procedure which is inherent in the Administrative Procedure Act.

The provision for suspension of the certificate, permit or application is different from that provided in Part II of the Interstate Commerce Act relating to motor carriers, in that Section 212(a), in the first proviso, gives the carrier a reasonable period to put its house in order pursuant to an order of the Commission (issued after notice and hearing, as provided in Section 204(c)) commanding obedience to the section of the Act found to have been violated. Such an order is a prerequisite to suspension or revocation under Section 212(a). A similar proviso should be inserted in S. 905 and S. 1501.* Certainly

* Section 212(a) of the Act, relating to motor carriers, provides as follows:

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or ter-

nere is no reason why the water carriers should not be entitled to similar protective procedures as are provided for motor carriers in the first proviso of Section 212(a) quoted in the footnote.

It is believed that this matter is of sufficient importance to warrant the Section in taking a definite position in opposition to the provisions of the last sentences of S. 905 and S. 1501.

H.R. 287. This is a Bill, the stated purpose of which is to provide for the separation of subsidy from air mail pay in accordance with recommendations of the Commission on Organization of the Executive Branch of the Government. Section 2(a) of the Bill amends subsections (a), (b), and (c) of Section 406 of the Civil Aeronautics Act (49 USC Section 486) which relate to the authority to fix compensatory rates and which provide for the determination of the amount of subsidies to air carriers. The provisions are detailed and mostly involve provisions not pertinent to the field of administrative law. However, your Committee has examined the provisions and they seem to provide adequately for notice and hearing both on the matter of compensatory rates and subsidies.

Section 3 amends Section 407(d) of the Civil Aeronautics Act (Title 49 USC Section 487) with reference to the allocation of air mail carrier receipts and expenditures, and provides for the prescription of standards by which air carriers, in keeping their accounts, records and memoranda, shall allocate receipts from and expenditures for the air transportation services rendered. Again, there is sufficient provision for notice and hearing and no other administrative law questions are observable in this section.

Sections 4 and 5 of the Bill relate to additional information and annual reports and to certain studies and reports to be made by the Board and present no question of interest to the Section of Administrative Law.

H.R. 2970. This is a Bill to amend the Interstate Commerce Act in order to expedite and facilitate the termination of railroad reorganization proceedings under section 77 of the Bankruptcy Act and to re-

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minated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of Section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210(a), may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

quire the Interstate Commerce Commission to consider, in stock modification plans, the assents of controlled or controlling stockholders, and for other purposes.

The Bill provides some detailed provisions for securing assents of stockholders in railroad reorganization proceedings under Section 77; provides certain additional standards to guide the Commission in carrying out its responsibilities in connection with such proceedings; and provides other changes of more or less importance in existing procedures. Extended analysis seems unnecessary. It is sufficient to say that the Committee has not found anything in the Bill that is objectionable from the procedural standpoint.

Wendell Berge,
Chairman

REPORT OF WHITNEY HARRIS, COUNCIL MEMBER TO WHOM WAS REFERRED CERTAIN MATTERS RELATING TO JUDICIAL REVIEW

One of the matters discussed at the midwinter meeting of the Council of the Section of Administrative Law was the reference to the Council by Mr. Alfred J. Schweppe of the recent case of *Household Finance Corp. v. State,* 40 W. 2d 451, 244 P. 2d 260. This case involved the constitutionality of certain sections of the Washington Small Loan Act pertaining to judicial review of decisions of the Supervisor of Banking on applications for licenses to operate small loan businesses in the State of Washington. The Council requested that I look into this decision and submit recommendations whether any action should be taken in the particular case and whether the Council should endorse the suggestion of the Chairman to establish a Committee on Judicial Review to consider this and other similar problems arising in the future.

In the referred case the Supreme Court of the State of Washington held unconstitutional a portion of the Small Loan Act which granted to applicants a trial de novo in the Superior Court on review of decisions of the Supervisor of Banking denying applications for licenses to operate small loan businesses. The holding was based on the theory that the granting of a trial de novo would be an unconstitutional exercise of legislative power by the judiciary. The Court held that judicial review must be limited to the determination whether the Supervisor of Banking had acted arbitrarily, capriciously, or contrary to law.

Interest in the case arises out of the fact that the decision was based upon constitutional grounds and not upon statutory construction. The court refused to construe the de novo provision as calling for review by substantial evidence. It held, on the contrary, that the Legislature intended a genuine trial de novo, according to the preponderance of evidence, and concluded that this delegation exceeded constitutional limitations. The court did not consider the possible middle-ground approvals by which the trial on review would be according to the preponderance of the evidence, subject, however, to a presumption of validity of administrative action, and with the burden upon the applicant to prove unreasonableness of the order.

I feel sure that all members of the Section will be interested in this case and recommend that it be referred to Mr. Schwartz for inclusion in an early issue of the Administrative Law Bulletin. The Council should not take action on a matter of this kind, however, without benefit of a recommendation from an appropriate committee empowered to look into the problem. The only committee we now have to which the case might be assigned is the Committee on State Administrative Law. That Committee is primarily concerned with legislation and with surveys of state administrative procedures. I am not at all sure that it should be expected to work on specific problems of judicial review which might exist in federal, as well as in state, law.

It seems to me that our committee organization could be strengthened by the creation of two new general committees. We now have a committee on Improvement of Administrative Procedures. This committee's work might well be supplemented by the creation of committees on Administrative Legislation and Judicial Review of Administrative Action. These three committees, together with the National Committee, would cover all assignments which do not fall within the premise of particular agencies or activities or which do not relate to particular legislation or proposals for which we now have special committees.

The Council might want to consider modification of our Section organization to accomplish these objectives. Thus, we might divide the section entitled "General and Miscellaneous Committees" into its two parts. Under the group "General Committees" place the National Committee, the new committee on Administrative Legislation, the present committee on Improvement of Administrative Procedures, and the new committee on Judicial Review of Administrative Action. The group "Miscellaneous Committees" would then consist of the present committees less the National Committee.

I believe that this modification of our committee organization would give us better coverage of the field of administrative law than is afforded at present. The net effect of the proposal will be to establish the two new committees, one to deal with administrative legislation and the other with judicial review of administrative decisions. This will not result in jurisdictional conflicts with special committees since the general committees will not be empowered to function in any area served by a committee on a particular agency or activity or on particular legislation or proposals. Our committee structure in other respects would be unaffected.

Sincerely,

Whitney Harris

REPORT OF THE COMMITTEE ON ADVERTISING, TRADE AND SECURITIES REGULATION

This Committee has been divided into two subcommittees, Vice Chairman Sumner S. Kittelle being concerned with the Federal Trade Commission sub-committee, and Vice Chairman Charles H. Kinnane with the Securities and Exchange Sub-committee.

Mr. Kittelle has provided all members of the F.T.C. sub-committee with the proposed draft of new Rules of Practice of the Federal Trade Commission and a number of

proposed amendments to the present rules. The consideration of these is an extended project and, because of the new administration within the Commission, it was decided to defer complete and final consideration until the coming year.

The S.E.C. sub-committee gave active consideration to the amendment to the Rules of that Commission which requires the filing of consents to service of process by certain non-residents engaged in various aspects of the securities business. The results of this study were communicated to the S.E.C. prior to final adoption of the amendment. Apart from numerous amendments related to information requirements and filing of forms, this sub-committee was not required to consider any other major item involving S.E.C. practice.

During the course of the year proposed legislation affecting banks and savings and loan associations has been referred to this Committee and it, in turn, became the subject of consideration by the S.E.C. subcommittee. There was little interest in this field and it is possible that those members of the Section who are interested in it are not members of this Committee. For this reason, provided that it is not ascertained that there are a sufficient number of members of the Section interested in forming a banking sub-committee, proposed legislation in this field should be referred only to the Committee on the Administrative Procedure Act or the Committee for the Improvement of Administrative Procedures for the limited purpose of policing such legislation as it may be related to the Act.

Herman Tocker
Chairman.

REPORT OF THE COMMITTEE ON EMERGENCY AGENCIES

The principal activity of the Committee on Emergency Agencies during the past year has been the maintenance of surveillance over such proposed Federal legislation as has dealt with emergency economic controls and the agencies that administer such controls.

Of greatest interest and concern to the committee has been the evolution and progress of the legislation that culminated in Public Law 95, 83d Congress, approved June 30, 1953, the "Defense Production Act Amendment of 1953." Under the terms of this act, "to provide authority for temporary economic controls, and for other purposes," certain provisions of the Defense Production Act of 1950 are extended for two years. These provisions, which will terminate June 30, 1955, relate to: priorities and allocation controls and hoarding; expansion of productive capacity and supply; and the general administration of the Act (including the exclusion of functions exercised under the Act from the operation of the Administrative Procedure Act except as to the requirements of the Public Information Section thereof).

The Small Defense Plants Administration is continued through July 31, 1953, only; and those provisions of the Defense Production Act having to do with authority to requisition and condemn, price and wage stabilization, settlement of labor disputes, and control of consumer and real estate credit have been terminated.

It is the opinion of the committee that the procedures and practices so far em-

ployed by the emergency and other agencies exercising emergency powers have, on the whole, accorded essential fairness to persons whose rights are affected by the actions of those agencies. For this reason, and because of the substantial curtailment of emergency controls, it is recommended that the Committee on Emergency Agencies be continued on a stand-by basis only, at least for the present.

Harry J. Breithaupt, Jr.
Chairman

July, 1953

REPORT OF COMMITTEE ON INTERIOR DEPARTMENT AND NATURAL RESOURCES

1. *SCOPE OF THIS REPORT*

The assignment to your Committee covers the surveillance, review, analysis of and formulation of recommendations with respect to the adjective and substantive law of the Department of the Interior and other departments and agencies of the Federal Government whose jurisdictions relate to the development and conservation of our natural resources, such as the Federal Power Commission and the Corps of Army Engineers. There are many other governmental agencies which perform functions affecting our natural resources.

In this, our initial report, we shall undertake an analysis and offer certain recommendations relating to the administrative processes within the Department of the Interior. In later studies we plan to review the substantive law administered by the Department relating to conservation and development of natural resources and to consider such related subject as codification of the public land laws.

Among the subjects which we have studied are the procedural requirements contained in the statutes administered by the Department of the Interior, the extent of the compliance or the noncompliance of the Department with those requirements, the extent to which the Administrative Procedure Act is applicable to the Department or its subdivisions, and the extent to which the Department has complied with the Act where applicable.

Obviously the task we set for ourselves is a formidable one. Since the time at our disposal was limited we were unable to probe as deeply into the subject matter or to make as comprehensive an analysis of the Interior Department's procedures as might have been made. We have, however, completed sufficient research and review to make some pertinent observations and we believe some constructive recommendations.

The cooperation given us by the Interior Department, particularly its attorneys, was gratifying. They were most helpful in making records available for our review and in discussing procedural matters with us.[1]

II. *THE DEPARTMENT OF THE INTERIOR, ITS SUBDIVISIONS AND DUTIES*

The jurisdiction of the Department of the Interior "extends over the continental United States, to islands in the Caribbean and the South Pacific, and to lands in the Arc-

[1] The new Solicitor of the Department, Clarence Davis, Esquire, has been a member of our Administrative Law Section for many years. We are certain that he will give earnest consideration to any recommendation the American Bar Association may present to him.

tic Circle. It includes the custody of 750 million acres of land, the conservation and development of mineral resources and the promotion of mine safety, the protection of fish and wildlife, the administration of the Nation's great scenic and historic areas, the reclamation of arid lands of the West through irrigation, and the management of hydroelectric power systems. The Department of the Interior is also responsible for the welfare of nearly three million persons in the Territories and Island possessions of the United States and in the trust territory of the Pacific islands, and guardianship of about four hundred thousand Indians in the continental United States and about thirty-five thousand Indians and natives in Alaska".[2] To carry out its many activities, the Department is composed of the Office of the Secretary and the following eighteen subdivisions:[3]

"Bureau of Indian Affairs
Bureau of Land Management
Bureau of Mines
Bureau of Reclamation
Fish and Wildlife Service
Geological Survey
National Park Service
Bonneville Power Administration
Southwestern Power Administration
Southeastern Power Administration
Office of Territories
Alaska Railroad
Alaska Road Commission
Defense Electric Power Administration
Defense Fisheries Administration
Defense Minerals Exploration Administration
Defense Solid Fuels Administration
Petroleum Administration for Defense"

[2] *United States Government Organization Manual* 1952-53, p. 196.

[3] *Ibid.*

No attempt will be made in this report to consider and evaluate the administrative procedures of all of the various subdivisions of the Department, nor would such an inquiry serve a useful purpose since the work of the great majority of them clearly cannot be said to involve either administrative adjudication or rule making in the commonly accepted meanings of those terms. Your committee believed that its study would be best employed in a review of the procedures of the Bureau of Land Management, the Bureau of Indian Affairs and of the Fish and Wildlife Service since their procedures come closest to the traditional concepts of administrative law and are of vital concern to practicing lawyers in many sections of the United States. They will be discussed seriatum.

A. *Bureau of Land Management.* Of all the subdivisions of the Department, this Bureau is charged with administration of more statutes relating to natural resources than any other subdivision in the Department. In all it has been estimated that it administers some 5,000 statutes, including the Mineral Leasing Act;[4] the Taylor Grazing Act [5] and the Homestead Act.[6]

In addition, other statutes providing for various rights of way and easements over the public lands, for sale of timber and stones, and other material on the public lands, for withdrawals and reservations, for desert land entries, for sale of isolated tracts, and for the acquisition of scores of

[4] 41 Stat. 437, 30 U.S.C. 181.

[5] 48 Stat. 1269, 43 U.S.C. 315.

[6] R.S. 2289, 43 U.S.C. 161.

other interests in the public lands come within its jurisdiction.

The Bureau issues rules and regulations and adjudicates rights under the statutes entrusted to its administration. It is, of course, with these two aspects of its work that this report is concerned.

Statistics recently released by the Bureau demonstrate the magnitude of its adjudicatory functions: As of May 30, 1953, there were pending 40,842 unclosed adjudication cases under the public land laws exclusive of grazing and timber cases. The following table compiled from the annual reports of the Director of the Bureau of Land Management for the fiscal years indicated shows the status of adjudication cases:

Year Ending June 30	*Unclosed Adjudication Cases*	*New Adjudication Cases*
1949	47,999	31,545
1950	41,693	33,965
1951	31,319	34,033
1952	37,774	49,567[7]

As already stated we will discuss the general pattern of the Bureau's rule making and adjudicatory processes. The following table sets forth a general summary of the procedural features of three important acts it administers:

	Mineral Leasing Act	Taylor Grazing Act	Homestead Act
1. Statutory Requirements			
a) For judicial review	No	No	No
b) For hearing	No	Yes ab	No
c) For rule and regulation proceeding		Yes c	
2. Requirement in regulations			
a) For hearing of application or petition prior to denial	No	Yes d	No
b) Appeal to Secretary	Yes e	Yes ef	Yes
c) Hearing on appeal	Yes g	Yes g	Yes g
d) Protests or contests	Yes h	Yes h	Yes h

The Director of the Bureau of Land Management has been given authority to exercise the Secretary's duties with respect to public lands.[8] Further, the Director was given authority to promulgate regulations to carry out the land laws.[9]

1. *Contests.* The Regulations of the Bureau provide that contests may be initiated by "any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry, filing, or other claim under laws of Congress, relating to the public lands, because of priority or claims, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Bureau of Land Management."[10] The contest is initiated by

[7] Report of the Director of the Bureau of Land Management 1952 (Statistical Appendix). See Tables 70, 71, and 72 pp. 90, 91, and 92. This report clearly demonstrates the importance of the Bureau's work in the field of natural resources. It shows, among other things, that as of June 30, 1952, the Bureau had under its exclusive jurisdiction 470,067,644 acres of public lands in 26 states and Alaska (Table 3, 5). It administered grazing district lands covering 158,182,623 acres of Federal lands and 1,892,927 acres of non-Federal lands (Table 4, p. 6). In addition, it had jurisdiction over 63,601 mineral leases on 48,786,209.51 acres of public land outstanding as of June 30, 1952 (Table 22, p. 26). For the fiscal year 1952 it gave final approval to 357 homestead entries covering 41,964.74 acres (Table 35, p. 55).

a Section 1 requires the Secretary to hold a hearing, after public notice before creating grazing districts. 43 U.S.C. 315.

b Section 9 requires the Secretary to grant "local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department" 43 U.S.C. 315 h.

c Sec. 2, 43 U.S.C. 315 a.
d 43 C.F.R. § 161.9 (e).
e 43 C.F.R. § 221.73.
f 43 C.F.R. § 161.9 (m).
g 43 C.F.R. § 221.
h 43 C.F.R. 160.7.

[8] R. S. Sec. 453, 43 U.S.C. 2.

[9] R.S. Sec. 2478, 43 U.S.C. 1201.

[10] 43 C.F.R. 221.1.

the filing of an application in duplicate with the manager of the local office together with a statement under oath, corroborated by the affidavit of at least one witness having such personal knowledge of the facts as, if proven, would render it subject to cancellation which facts must be set forth.[11]

The manager is required to act "promptly upon all applications to contest and upon the allowance of any such application" to issue a notice to the persons adversely affected advising him the names of the parties, description of the land involved, etc., and that unless the adverse party appears and answers within 30 days after service of notice, the allegation of the contest will be taken as confessed."[12]

Upon the filing of an answer and proof of its service, the manager is required to "forthwith fix a time and place for taking testimony, and notify all parties thereof by registered mail not less than 20 days in advance of the day fixed."[13]

The regulations provide for continuances,[14] for the taking of depositions and interrogatories[15] under certain conditions, and for intervention.

The actual trial[16] is conducted by the manager or other public officer authorized to administer oaths. Cross examination by opposing claimants is permitted. It is required that the testimony of all witnesses be reduced to writing. The manager is required to notify the parties in writing of the conclusion. Provision is made for new trial on the basis of newly discovered evidence only,[17] and for appeals to the Director of the Bureau of Land Management.[18]

2. *Appeals to the Secretary.* The Regulations provide that "in any proceeding relating to the public lands, an appeal may be taken to the Secretary of the Interior from a final decision of the Director (of the Bureau) or from a decision of the Director which, prior to its promulgation, has been approved by the Secretary.[19]

Within 20 days after service of notice of appeal to the Secretary, the appellant may file a brief which must also be served on the appellee.[20] Oral argument will be permitted on motion in the discretion of the Secretary.[21]

3. *Appeals to Courts of Law.* Generally no provision is made in the public land statutes for judicial review of the actions of the Secretary. Those seeking judicial review of the Secretary's actions must ordinarily resort to such equitable remedies as mandamus. In such cases the courts have frequently applied the rule that mandamus will not lie to overturn an administrative decision where discretion and the determination of questions of fact are involved.[22]

[11] 43 C. F. R. 221.2, .3.

[12] 43 C.F.R. 221.5.

[13] 43 C.F.R. 221.15.

[14] 43 C.F.R. 221.17.

[15] 43 C.F.R. 221.20.

[16] 43 C.F.R. 221.33 et seq.

[17] 221.41.

[18] 221.47.

[19] 43 C.F.R. 221.73.

[20] 43 C.F.R. 221.79.

[21] 43 C.F.R. 221.80.

[22] See Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324-325, (1902); Work v. Rives, 267 U.S. 175, 177-178 (1924); Hall v. Payne 254 U.S. 343, 347-348 (1920); Ness v. Fisher, 223 U.S. 693, 691-692 (1912); Wilbur v. United States, 281 U.S. 206, 218-219 (1930).

In *Riverside Oil Co.* v. *Hitchcock,* the Supreme Court stated:

> "That the decisions of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him to make." (190 U.S. 325, 326)

Another principle which confronts those seeking judicial review of the Secretary's action in public land matters is that such actions are, in many cases, actually suits against the United States and hence without the courts' jurisdiction in the absence of Congressional consent.[23]

[23] Louisiana v. Garfield, 211 U.S. 70 (1908). For more recent cases on the general subject of the immunity of the United States, see Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) and Seiden v. Larson, 188 F(2) 661 (1951) Cert. den. 3410. S. 950.

Bureau of Indian Affairs. This agency administers some 4000 statutes and treaties relating to the Indians.[24]

In the field of adjudication it has important duties steming from the Act of June 25, 1910 [25] which gave the Secretary jurisdiction to probate the wills and determine the heirs of deceased Indians who die leaving restricted lands. The Bureau has issued regulations under the 1910 Act as amended applicable to Indians' estates,[26] except as to members of the Five Civilized Tribes and the Osage Indians.[27] These regulations provide for "Examiners of Inheritance" to adjudicate claims to the estates of deceased Indians. It is noted that the Bureau of Indian Affairs has on several occasions promulgated changes in its regulations without previously publishing notice of their intention and proposals.[28] While section 4 (a) of the Administrative Procedure Act does not require general notice of proposed rule making in the case of interpretive rules, policy statements, rules of agency organization, procedure or practice, it would seem that at least some of the changes made in the rules might not come within those exceptions.

In addition to its jurisdiction over Indian decedents' estates, the Bureau of Indian Affairs exercises a host of supervisory functions relating to the sale or leasing of Indian lands, the negotiation of contracts

[24] Cohen: Handbook of Federal Indian Law (1945) Published by U. S. Gov't Printing Office.

[25] 36 Stat. 855.

[26] 25 C.F.R. 81 et seq.

[27] See 25 C.F.R. 82 (Five Civilized Tribes) and 25 C.F.R. 83 Osage) 26.

[28] 17 F.R. 4109—May 3, 1952; 17 F.R. 2305, 2306—March 18, 1952.

involving Indian trust or restricted personal property, the expenditure by Indians of funds received from cattle sales, land sales, or rentals, the administration of justice and other public services on Indian reservations, the employment of attorneys by Indian tribes, and a mass of other activities in which Indian Bureau regulations or Federal laws impose special limitations upon tribal Indians. The vast scope of these controls and the paternalistic character and antiquity of many of them make it particularly important that Indians be accorded a full opportunity to be heard before Bureau decisions vitally affecting their lives and property are promulgated. Yet in the general course of Indian Bureau administration (outside of probate cases), decisions are commonly made without according a hearing to the interested parties. It is hoped that measures may soon be inaugurated to correct this long-standing procedural inadequacy. Indians are entitled under the law to full citizenship. Such citizenship is a hollow privilege if Indians are excluded from participation in the decisions which most seriously affect their lives and their property. Such participation cannot be fully effective unless Indians are free to employ legal counsel of their own choosing to defend their liberties and their property rights.

One of the most serious sources of complaint on the part of Indians throughout the country in recent years has had to do with infringements upon the freedom of Indian groups to employ attorneys in defense of their legal rights. Taking account of widespread charges of administrative interference with the Indian's right to counsel, the American Bar Association in 1951 appointed a Special Committee on Contracts of Lawyers with Indian Tribes to investigate this subject and to make recommendations with respect to new far-reaching regulations on this subject proposed by the Bureau of Indian Affairs in November, 1950. The Committee, of which Rufus G. Poole, Esq., was Chairman, after several months of intensive study, submitted a comprehensive report on November 8, 1951, which was approved by the Administrative Law Section of the Association.

The Committee reported that it had been "unable to find evidence of any necessity to turn the clock backward so as to subject the Indian tribes to the minute and detailed controls which are prescribed in the proposed regulations." In particular, the Committee found that with respect to the attorney contracts of organized tribes, the Indian Bureau had statutory authority to pass only on two elements of the contract, namely, the selection of counsel and the fixing of fees, and that activities of the Bureau with respect to other aspects of such attorney contracts were unauthorized and improper. The Committee found that some of the requirements imposed by the Indian Bureau as conditions to the approval of contracts were in violation of the canons of professional ethics of the American Bar Association. Finally, the Committee suggested that the authority over attorney contracts be transferred from the Commissioner of Indian Affairs to the Solicitor of the Department of the Interior.

At a public hearing held by Secretary of the Interior Oscar L. Chapman on January 4, 1952, members of the Association's Spe-

cial Committee testified, under authorization from the Board of Governors of the Association, in support of the findings and recommendations of the Committee Report. Secretary of the Interior Oscar L. Chapman, after hearing the representatives of the American Bar Association and more than 40 other witnesses representing other organizations, all of whom opposed the proposed new regulations, rejected the proposed regulations on January 24, 1952, and announced the appointment of a special Departmental committee to review the entire problem with representatives of the American Bar Association and other interested groups. Unfortunately, the committee so appointed never met. The Bureau of Indian Affairs thereafter continued to deal with attorney contracts substantially along the lines criticized by the Association's Special Committee. The Bureau contended that the proposed regulations were merely declaratory of prior practice and would therefore continue to serve as guides, despite their rejection by the Secretary of the Interior, until the newly appointed Departmental committee worked out alternative arrangements and procedures. The result of all this is that Indian tribes are apparently still being denied the freedom that is enjoyed by their fellow-citizens and that they are properly entitled to exercise under existing law in contracting for the services of attorneys. This is a matter that should have the continuing attention of the American Bar Association.

C. *Fish and Wildlife Service.* The main "objective of all Fish and Wildlife Service programs is to insure the conservation of the Nation's wild birds, mammals, fishes, and other forms of wildlife (both for their recreational and economic values), with a view to preventing the destruction or depletion of these natural resources, and to promote the maximum present use and enjoyment of the wildlife resources that is compatible with their perpetuity." [29]

The most important statutes administered by the service are the Migratory Bird Treaty Act,[30] The Alaska Game Law,[31] and the Alaska Commercial Fisheries laws.[32] The Fish and Wildlife Service has only minor duties of an adjudicatory nature. Its regulations under the Migratory Bird Treaty Act govern such matters as the means by which migratory game birds may be taken, hunting conditions such as open seasons, bag limits, shipment, transportation, and possession of certain migratory birds, etc.[33] Under the Alaska Game Law it issues regulations respecting game animals, fur animals, game birds, non-game birds, and game fishes in Alaska.[34] Its regulations under the Alaska commercial fisheries laws are designed to conserve the fisheries resources of the Territory while permitting the maximum commercial yield.[35]

The regulations of the Fish and Wildlife Service must undergo regular revisions to reflect changed conditions from year to

[29] *United States Government Organization Manual* 1952-53, p. 206.

[30] 40 Stat. 755, 49 Stat. 1555, 16 U.S.C. 703.

[31] 57 Stat. 301, 48 U.S.C. 192-211.

[32] 44 Stat. 752, 48 U.S.C. 221-224; 50 Stat. 557, 48 U.S.C. Supp. IV, 223 b; 52 Stat. 208, 48 U.S.C. Supp. IV 222a; 43 Stat. 465, 48 U.S.C. 225, 234, 226-228; and 48 Stat. 594, 48 U.S.C. 233, 232 among others.

[33] 50 C.F.R. § 6.1 et seq.

[34] 50 C.F.R. § 46.1 et seq.

[35] 50 C.F.R. § 101 et seq.

year. Notice of proposed changes in the regulations were published in the *Federal Register* recently as follows:

Law	*Issue of Federal Register*	*Citation*
Alaska Commercial Fisheries laws	June 18, 1953	18 FR 3485
Migratory Bird Treaty Act	May 26, 1953	18 FR 3024
Alaska Game Law	Jan. 16, 1953	18 FR 363

The notice of proposed rules changes issued by the Service do not always set forth the specific nature of the proposed amendments since they ordinarily relate to such matters as adjustments in seasons, bag limits, and similar matters. Where the proposed changes in regulations are of a fundamental nature such as changes in requirements as to bait, etc., the notice gives some detail re their nature. Your committee believes that the Service should specify the general nature of proposed changes in its rules in all instances rather than to rely on its own judgment as to whether a particular change is "fundamental".

III. CRITIQUE OF THE INTERIOR DEPARTMENT'S ADMINISTRATIVE PROCESS

Our examination of the Department's administrative processes and practices has revealed several deficiencies as follows:

A. *Adjudication.*

1. Aside from the question of the procedural adequacy of the regulations themselves, it appears that subdivisions of the Department, particularly the Bureau of Land Management, have failed in many instances to follow those regulations.

2. It is noted that the Bureau of Land Management regulations permit the rejection of applications for oil and gas leases under the Mineral Leasing Act, petitions for classification under the Homestead Acts, and for various other interests under the public land laws after *ex parte* proceedings. Although an opportunity for a hearing may be afforded at later stages on appeal to the Secretary, it would seem that the rights of applicants would be best protected if they have an opportunity to meet and answer any objections to applications before they are rejected at the lower echelons rather than to hope for success on appeal. Doubtless such a process tends to discourage applicants from the pursuance of their rights.

3. The wisdom of the secrecy inherent in many of the phases of the Bureau of Land Management's administrative process is questionable. For instance, each file covering an application for a mineral lease, or for a right-of-way across public lands contains a portion marked "confidential" which is available only to Bureau of Land Management employees. If an attorney for an applicant or claimant seeks to examine the file, the "confidential" portion is separated before it is made available to him. It would seem that the fair administration of the public land laws make it incumbent upon the Bureau to justify its keeping data relating to a particular application secret.

Another aspect of the problem of secrecy in the Bureau's administrative process centers about technical reports supplied by subdivisions of the Department in connection with the adjudication of applications or petitions. For example, if a person applies for an oil and gas lease, the Bureau's adjudicator-attorney must refer the appli-

cation to the Geological Survey for a report on such vital technical questions as the structure and mineral character of the lands. The Survey submits its report to the adjudicator-attorney, who uses it in his determination of whether the application should be rejected, but the applicant never has an opportunity to examine it. The Bureau's decision rejecting an application may set forth the Survey's conclusions, but seldom the technical basis on which the conclusion rests. Thus the applicant is in no position to resist the grounds on which the ultimate conclusion is based. This information is denied to the applicant even when the case is on appeal to the Secretary. There is no apparent reason why the reports of the Geological Survey and other factual reports should not be made available to applicants *before* rejection of their applications so that they may be able to controvert the basic facts and conclusions.

4. Another deficiency in the Department procedures is the general lack of provision for completely independent review of administrative determinations. It is not unusual for those rendering opinions in public land cases to sit in review of their own decisions.

When matters are appealed to the Secretary, there may be conferences between the legal officers responsible for the decision at the lower echelons and the attorney in the Office of the Solicitor who is to decide the matter on appeal without the presence of party whose rights are under adjudication. Such a practice would seem prejudicial to the rights of litigants before the Department, and is in conflict with the spirit of the Administrative Procedure Act.

5. Applicants before the Department in public land cases have in some instances been faced with allegations by Department attorneys having an adverse bearing on their applications without being apprised of the basis or origin of such allegations.

6. There is a tendency in the Department to accept statements from persons bearing on material facts in matters under adjudication without requiring such statements to be under oath.

7. The length of time involved in the adjudication of public land cases has been a matter of concern to many lawyers. It is not unusual for cases to drag on for months and even years before a final administrative determination. Earlier we pointed out that as of May 30 there were over 40,000 unclosed cases pending before the Bureau of Land Management, while for the past four years such cases have ranged from a high of 47,000 cases to a low of 31,000.

8. Lastly, we feel that many statutes are deficient in their failure to provide for judicial review of acts of the Department relating to natural resources. Naturally, it might be neither necessary nor desirable to provide for judicial review of all natural resources legislation, but it would seem desirable in some instances, particularly where a quasi-judicial function or a rule making proceeding affecting existing rights are involved.

B. *Rule Making.*

The importance of the rule making activities of the Department of the Interior cannot be emphasized too strongly. The regu-

lations issued by the Department affect all persons seeking leases and interests in the public domain, in such commercial pursuits as mining and fishing, sportsmen, those enjoying the recreational opportunities of National Parks and reservoirs, etc. Since the regulations implement the laws, they are in many ways more determinative of rights from the standpoint of the citizen than the laws they implement.

Outside of the Fish and Wildlife Service, we have found few instances of the Department holding hearings other proceedings in quest of guidance of interested parties in formulating regulations. While the public would probably show little or no interest in the rule making of most of the subdivisions of the Department, still an opportunity to participate should be given in all instances. It would seem that the following minimum requirements should be met in connection with all Department rule making: (1) Publication of proposed rules and regulations, (2) date fixed for comments, and (3) issuance of a report ruling upon all proposals and comments received.

IV THE DEPARTMENT AND THE ADMINISTRATIVE PROCEDURE ACT

A. *Adjudication.*

Section 2 of the Act defines "order" and "adjudication" as follows:

> "(d) *Order and Adjudication.* 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

Sections 5, 7, and 8, prescribe the procedure in formal administrative adjudication. The latter two sections deal with hearings and decisions, respectively, while section 5 deals with the exemptions from the procedural requirements of sections 5, 7, and 8.

Section 5 provides in part as follows:

> "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved . . ."

Section 5 is perhaps the most controversional in the entire Administrative Procedure Act. Its initial clause makes the formal procedural requirements of sections 5, 7, and 8 applicable only "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[36] Thus, this section does not enlarge upon the requirements for hearings by agencies but rather provides that where existing statutes require hearings that they be conducted in accord-

[36] "This section defines generally the procedure for the administrative adjudication of particular cases. The introductory clause removes from the operation of section 5, 7, and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing, . . . Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing." *Senate Judiciary Committee Print,* June 1945. Legislative History of the Administrative Procedure Act, House Doc. 248, 79th Cong. 2nd Sess., p. 22.

ance with the strict requirements of the Act.[37]

The great stumbling block to the applicability of the adjudication provisions of the Act to the administrative processes within the Department is the fact that so few of the statutes it administers require it to conduct hearings, e.g., the Mineral Leasing Act, the Homestead Act, etc.

On some occasions applicants seeking interests in the public lands have on appeals to the Secretary of the Interior asserted the right to a hearing pursuant to the provisions of the Act. In one such action [38] an applicant appealed to the secretary from a decision by the Bureau of Land Management rejecting his application to enter a tract of land in Alaska under the Soldier's Additional Homestead law [39] and, in connection therewith, claimed a right to a hearing under the Act. The Acting Solicitor of the Department rejected the claim stating:

> "Appellant's allegation that it was entitled to a hearing pursuant to the provisions of the Administrative Procedure Act (15 U.S.C. 1946 ed., sec. 1004) are without merit. The provisions of that act have no applicability to the present case because there is no statutory requirement that the determination respecting a Soldier's additional Homestead entry be made on the record after an opportunity for hearing."

In another appeal under the same act, the Department stated:[40]

> "The Appellant's objections concerning the absence of an opportunity to be heard with respect to the coal classification of the land are without merit. "In the first place, section 5 of the Administrative Procedure Act . . . is inapplicable to this proceeding, because the scope of section 5 is limited to cases of adjudication 'required by statute to be determined on the record after opportunity for an agency hearing * * *' There is no statutory provision requiring a hearing with respect to the mineral classification of public lands."

In another case the Solicitor affirmed the action of the Bureau of Land Management's rejection of a desert land entry on grounds that there was not a suitable water supply available for irrigating the land. In his opinion the Solicitor stated:

> "On appeal, Mr. Pulos maintains that he is entitled to a hearing at the district land office on the question of whether water is available for the irrigation of the land involved, but he does not specify any basis for a right to such hearing. We are aware of no legal basis for the right claimed by the appellant. The determination whether a particular tract of land should or should not be classified as suitable for desert-land entry is wholly discretionary with the Secretary of the Interior (or his designee) and there is no requirement of law that the determination shall be based upon a record completed at a hearing (see 43 U.S.C. 1946 ed., sec 315 f). Accordingly the provisions of the Administrative Pro-

[37] This is not, of course, to say that in all cases where an administrative hearing is required by statute that the requirements of section 5 must be adhered to. That section excepts some five adjudications from its operations, none of which seem to be material to our discussion, even though an administrative hearing may be required by statute.

[38] Yukatat and Southern Railway, A-26438 decided September 19, 1952.

[39] 43 U.S.C. 1946 ed, sec. 271, 274.

[40] Libby, McNeill and Libby—A. 26310 decided April 10, 1952.

cedure Act . . . relative to hearings in Administrative proceedings have no applicability to the present case."[41]

B. *Rule Making.*

"Rule" and "rule making" is defined in section 2 of the Administrative Procedure Act as follows:

> "(c) Rule and rule making. "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, cost, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule."

Section 4 of the Act provides for the participation of the public in the rule making process. With specific exceptions this section requires each agency to give public notice of proposed rules through publication in the *Federal Register* and to afford interested parties an opportunity to present their views. The broad categories of exceptions to the requirements re rule making are:

> "(1) any military, naval or foreign affairs function of the United States or
> "(2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

[41] Comm Pulos, A-25872, decided August 4, 1950.

For present purposes the most important exception to the rule making requirements of section 4 of the Act relate to "public property". The extent to which natural resources under the jurisdiction of the Department of the Interior come within the meaning of "public property" determines of course, whether it is bound by the notice and public procedure requirements of the Act applicable to rule making. The exact meaning of "public property" as used in section 4 is not easily determined. Reference to the legislative history is of little or no assistance. The report of the House Committee on the Judiciary stated that the term "public property" would "include property held by the United States in trust or as guardian, as Indian property is often held."[42] Congressman Walter of Pennsylvania, who was in charge of the bill on the floor of the House, stated, "The exemption of proprietary matters is included because in those cases the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts."[43]

The Department of Justice interprets the words as follows:

> "(2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts". The exemption for matters relating to 'agency management or personnel' is self-explanatory and has been considered in the discussion of 'internal management' under section 3. The exemption of "any matter relating * * * to public property, loans, grants,

[42] H. Rep. No. 1980, 79th Cong., 2nd Sess. 1.25 of S. Doc. No. 248, 79th Cong., 2nd Sess.

[43] S. Doc. No. 248, 79th Cong., 2nd Sess., at p. 358.

benefits, or contracts' is intended generally to cover the 'proprietary' functions of the Federal Government. 92 Cong. Rec. 5650 (Sen. Doc. p. 358). It will be helpful to consider the implication of each of these phases separately."[44]

The Department of the Interior has construed "public property" as including the public domain and therefore concluded that it is exempt from the requirements of section 4. As a practical matter it would seem that the department's construction of the words "public property" may be too broad. It might be argued that in its control over the public domain the department's activities are more analogous to that of a trustee or administrator than to that of a proprietor.

In 1947, the Department of Justice raised the question of whether regulations under the Migratory Bird Treaty Act of July 3, 1918, signed on November 20, 1946, by the Acting Secretary of the Interior were not subject to section 4 of the Act. These regulations designed as a closed area "all areas of land and water in Dade and Monroe counties, Florida, not now owned or controlled by the United States" within a boundary specified in the regulations. In his opinion[45] the Solicitor of the Department discussed the question of whether the regulations came within the scope of the term "public property" as used in Section 4. After discussing various cases which hold that animals and birds *ferae naturae* are the property of the State, the Solicitor stated:

"As has been shown, the cases which speak of title to or ownership of wild animals or birds place the title or ownership in the States, not in the Federal Government. The exception of "public property" from the purview of section 4 extends only to property of the United States. Consequently, the exception would not cover rules regulating the taking of wild game on lands other than those of the Government."

* * * *

"Accordingly, it is my opinion that the regulations of November 20, 1946, and other regulations relating to the taking of migratory birds on privately owned lands do not pertain to 'public property' as that term is used in the exception to section 4 of the Administrative Procedure Act.

"I suggest that the regulations of November 20, 1946, be withdrawn, and that the procedure prescribed in section 4 of the Administrative Procedure Act be followed in connection with the issuance of regulations governing the taking of migratory birds on privately owned lands."

V. RECOMMENDATIONS

Based on our study of the administrative processes within the Department of the Interior, we make the following recommendation:

That the administrative practices and procedures of the Bureau of Land Management, particularly in the administration of the public land laws, be revised in such a way as to eliminate the abuses we have outlined in the third section of our report.

In our opinion, this revision could be brought about in either of the two following ways: (a) through a recommendation to the Department that it amend its proce-

[44] *Attorney General's Manual* on the Administrative Procedure Act (1947) p. 27.

[45] M-34864 to the Director, Fish and Wildlife Service, February 18, 1947.

dures in accordance with the spirit and requirements of the Administrative Procedure Act. This Act, while it requires adherence to its provisions in certain specified situations, also contemplates that agencies and departments will conform their administrative processes to its spirit wherever possible, even though they may not be technically bound under the terms of the Act; (b) through legislation making the Department's administration of the public land and other laws subject to the Administrative procedure Act. This could be done so far as adjudicatory processes are concerned by means of an amendment to the public land laws and other statutes administered by the Department requiring that rights under such statutes be determined on the record after opportunity for an agency hearing. Abuses in the field of rule making might be corrected by a clarification of the exception of "Public Property" appearing in section 4 of the Act.

Respectfully submitted,

Northcutt Ely,
Chairman
Isadore G. Alk,
Vice Chairman

Separate Statement of Clarence A. Davis, Solicitor, Department of the Interior, and a Member of the Committee

July 17, 1953

Mr. Timothy V. Dillon
Tower Building
Washington, D. C.

Dear Mr. Dillon:

Enclosed is the tentative draft of the report of the Committee on Interior Department and Natural Resources to the Section on Administrative Law of the Ame Bar Association, which has been r in this Department, and in connection with I should like to make the follow comments:

(1) As your footnote points out, we shall give the most earnest consideration to any recommendation the American Bar Association may make in connection with administrative procedure in the Department of the Interior.

(2) Speaking before the Administrative Law Section of the Bar Association of the District of Columbia on May 13, 1953, Secretary McKay expressed the policy of the new Department, and a copy of that address is hereto attached.[46] Needless to say, I am in full accord, and we shall endeavor to carry out the program therein outlined.

(3) I am just as unhappy as the Committee over the condition of some of the appellate records which reach this office, where the entire record consists of unsworn statements, not subject to cross-examination, and where there is frequently a direct contradiction of material facts. Under those circumstances, it is obviously beyond the wisdom of any official to be sure he has arrived at a correct determination.

One remedy, of course, would be to require all such contested matters, whether between a claimant and the Government or between conflicting claimants, to be heard before a Hearing Master, where witnesses are sworn, subjected to cross-examination and a certified record made.

Unfortunately, the practical aspect of handling the tremendous volume of cases does not make such procedure possible in

[46] Omitted in printing.

all cases without a very greatly increased personnel. This seems hardly justified in view of the fact that a very large number of the matters are settled by administrative determination at the grassroots, and apparently the contestants are reasonably satisfied with the over-all results, because the appeals to higher levels are definitely limited.

I am willing to go, and I am sure the Secretary is willing to go, as far as anyone to conform administrative procedure to the general standards of notice, opportunity to be heard, impartial determination by persons not theretofore connected with the controversy, the establishment of authentic and dependable records, and an orderly appellate process, tempering this ideal only insofar as the necessity of handling the work and the limitation of appropriations requires.

Therefore, we will be glad indeed to collaborate with the Committee in the months ahead, establishing as nearly as possible an ideal procedure as practical considerations will permit.

Under all these circumstances, I would not recommend any blanket application of the Administrative Procedure Act to all of the processes of this Department. On a selective basis and perhaps at an intermediate level I should think such a plan was possible. In any event, until further examination is made, both by your Committee and by this Department, I think legislation would be premature.

Sincerely

/s/ Clarence A. Davis
Clarence A. Davis
Solicitor

REPORT OF THE COMMITTEE ON AGRICULTURE, FOOD AND DRUG, AND PUBLIC HEALTH

Pending legislation which comes within the scope of the Committee is as follows:

H.R. 6434—to simplify the procedure for establishing food standards under the Federal Food, Drug and Cosmetic Act.

H.R. 6434, by Congressman Hale, replaces H.R. 5055. The purpose of the Bill is to accomplish two things. First, it would eliminate the requirement that food standards be promulgated on the basis of evidence of record at a formal hearing unless such a hearing is desired by any party who wishes to make a formal record on any portions of the proposed regulation to which objection is made. Secondly, it would broaden the scope of those who may petition for the establishment of a tolerance.

H.R. 6434 has just been reported out by the House Committee on Interstate and Foreign Commerce.

This Bill has had the active support of the Committee on Food, Drug and Cosmetic Law of the New York State Bar Association. It has had the informal support of the Division of Food, Drug and Cosmetic Law of the Section of Corporation, Banking and Business Law of the American Bar Association. It is my understanding that the procedure was developed by a committee of both of these organizations. Under these circumstances, I have not felt that it was necessary for this Committee to take action on the Bill.

H.R. 5740—Factory Inspection.

The House of Representatives has just passed this bill restoring the authority of factory inspection which was invalidated by the Supreme Court in the *Cardiff* case. In addition to restoring the factory inspection, the Bill also provides as follows: (1) that upon completion of an inspection the inspector shall give to the factory owner a report in writing with respect to the conditions observed which bear on sanitation or other conditions of a similar nature. This report must be given before the inspector leaves the premises; (2) that when any sample is obtained in the course of an inspection, the inspector must give a receipt therefor to the factory owner, describing the sample obtained; and (3) that whenever in the course of an inspection of a factory where food is manufactured, processed or packaged, the inspector obtains a sample of any food, and an analysis is made of such food to determine whether it contains filth, decomposition, or other similar contamination, a copy of the results of the analysis must be furnished to the factory owner.

Both the Committee on Interstate and Foreign Commerce and the House, through an amendment offered on the floor, considered the question of whether authority to inspect should be premised upon obtaining a search warrant. The Committee determined that the search wararnt procedure is inappropriate. The House upheld this same position by rejecting the amendment.

Since this Bill is primarily substantive in nature, this Committee has taken no action on it.

H.R. 4755—to simplify the procedure for establishing tolerances for pesticidal residues to the Federal Food, Drug and Cosmetic Act.

The House Committee on Interstate and Foreign Commerce has considered this Bill, which was introduced by Congressman Miller of Nebraska. The Bill would simplify the procedure for establishing tolerances for residues of poisonous and deleterious substances by removing this procedure from the public hearing provisions of Section 701(e) of the Federal Food, Drug and Cosmetic Act. As the Bill was originaly drafted, it provided for the issuance of tolerances upon the basis of a record made in an informal rule-making proceeding upon the basis of written evidence adduced in an ex parte manner. Judicial review was placed in the United States District Court for the District of Columbia. The reviewing court was given authority to review the entire record and make independent findings of fact and affirm, set aside, or modify the proposed regulations. This court review procedure was opposed by Chief Judge Harold M. Stephens of the United States Court of Appeals for the District of Columbia Circuit and Judge David A. Pine of the United States District Court for the District of Columbia. Their objection was premised upon the fact that quasi-legislative duties of this nature should not be imposed upon the courts. Conferences between the various parties interested in this bill are now being held in an effort to work out some of the differences of opinion. It appears that amendments may be offered which would provide for a public hearing of a formal rule-

making nature to receive evidence in support of objections filed to the proposed order. This provision would bring this bill substantially in line with the procedure of H.R. 6434, discussed above. It appears also that an amendment may be offered to change the court review procedure to accord more with the traditional type of administrative orders.

Congressman Miller and Congressman Delaney have introduced a number of other bills relating to chemical additives and cosmetic chemicals, but the House Committee on Interstate and Foreign Commerce has announced that it will take no action on these bills at the present session.

H.R. 384—This bill, introduced by Congressman Byrnes of Wisconsin, directs the Secretary of Agriculture to prescribe standards and requirements for imported articles where similar standards and requirements have been prescribed under applicable laws of the United States in respect to the production, manufacture, processing, packaging, distribution, or handling of any product of plant or animal life used or intended to be used, as food for human or animal consumption in the United States. The bill also specifies that no imported product of this character shall be entered into the United States for consumption "unless upon a showing that such product in its content and composition and in its production, processing, manufacture, distribution, and handling, has complied with the standards, quality and requirements" specified in the bill, compliance to be evidenced by a certificate to be issued by the Secretary of Agriculture pursuant to regulations established by him. There is no procedure specified in the bill for either establishing the standards or for issuing the certificates. This bill would present problems of a procedural nature which should be considered by this Committee if any action is taken upon the bill. Inquiries have indicated that there is not much likelihood that the bill will be considered.

J. Albert Hutchinson
Vice Chairman

John D. Conner
Chairman

making nature to receive evidence in support of objections filed to the proposed order. This provision would bring this bill substantially in line with the procedure of H.R. 6134, discussed above. It appears also that an amendment may be offered to change the court review procedure to accord more with the traditional type of administrative orders.

Congressman [illegible] of Delaney have introduced a [illegible] of these bills relating to [illegible] metic chemicals, but the House Committee on Interstate and Foreign Commerce has announced that it will [illegible] on those bills at the present session.

H.R. 884.—This bill [illegible] by Congressman Byrnes of Wisconsin, directs the Secretary of Agriculture to determine [illegible] areas and requirements for [illegible] where similar standards [illegible] have been prescribed under [illegible] of the United States to regulate production, manufacturing, processing, packing, distribution, or handling of any article, food, drug, device, or cosmetic, or any article which contains any such article, which is in part the product of the growth or cultivation of any kind of plant or animal and which is to be used, as food for human or animal consumption in the United States. The bill also specifies that no imported product of this character shall be entered into the United States for consumption "unless upon examination and in its production, processing, manufacture, distribution, and handling, has complied with the standards, specified in the [illegible] by a certificate of the Secretary of Agriculture [illegible] regulations established by the Secretary [illegible] the standards [illegible] certificates. This certificate would [illegible] by this Department if any [illegible] taken upon the bill. [illegible] indicated that there [illegible] after the bill will be